(37,431)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 734

KRAUSS BROS. LUMBER COMPANY, PETITIONER,

vs.

DIMON STEAMSHIP CORPORATION, CLAIMANT OF THE STEAMSHIP "PACIFIC CEDAR," HER ENGINES, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 25, 1933

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NAMES AND ADDRESSES OF PROCTORS.

Messrs. HAYDEN, MERRITT, SUMMERS and BUCEY,
Proctors for Appellant, 540 Central Building, Seattle, Washington.

Messrs. BOGLE, BOGLE & GATES,
Proctors for Appellee, 611 Central Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,
Libelant,

vs.

S. S. "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture; DIMON STEAMSHIP CORPORATION, a Corporation,
Respondents;

DIMON STEAMSHIP CORPORATION, a Corporation,
Claimant.

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*Page-number appearing at the foot of page of original certified Apostles on Appeal.

STATEMENT.

Suit was commenced on May 18, 1931, by the filing of libel *in rem* against the respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and *in personam* against respondent Dimon Steamship Corporation, a corporation.

Names of Parties:

Krauss Bros. Lumber Company a corporation, libelant;

Steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, respondent;

Dimon Steamship Corporation, a corporation, respondent;

Dimon Steamship Corporation, a corporation, claimant.

Respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, was attached under process issued upon libel, and thereafter, on May 19, 1931, was released upon bond filed by claimant in the sum of $3,000.00. [2]

Claim of ownership of Dimon Steamship Corporation as claimant of respondent steamship "Pacific Cedar," her engines, etc., was filed on May 19, 1931.

Claimant's exceptions to libel were filed on June 18, 1931.

The trial court's memorandum decision was filed July 14, 1931.

Libelant's petition for rehearing was filed July 27, 1931.

The trial court's memorandum decision, denying rehearing, was filed August 4, 1931.

Final decree of dismissal was signed September 14, 1931, and filed Sept. 18, 1931.

Filed Oct. 20, 1931. [3]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Libelant,

vs.

The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation,

Respondents.

LIBEL IN REM AND IN PERSONAM.

The libel *in rem* of Krauss Bros. Lumber Company, a corporation, against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and *in personam* against the Dimon Steamship Corporation, in a cause of contract, civil and maritime, alleges:

I.

That the libelant Krauss Bros. Lumber Com-

pany now is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office in the Henry Building in the city of Seattle, Washington, and now is and was engaged in the purchase of lumber and lumber products on the West Coast of the United States, and the transportation thereof to, and the sale thereof at, the Gulf and East Coasts of the United States.

II.

That respondent Dimon Steamship Corporation now is, and [4] at all times hereinafter mentioned was a corporation organized and existing under the laws of some foreign state, and engaged in the operation of a line of cargo vessels between the Pacific and the Atlantic and Gulf Coasts of the United States of America, doing business in the State of Washington, and maintaining an office in the city of Seattle. That at all times hereinafter mentioned respondent Dimon Steamship Corporation owned and operated the steamship "Pacific Cedar" as a freight carrier between said Pacific, Atlantic and Gulf ports of the United States of America.

III.

That the respondent steamship "Pacific Cedar," together with her engines, boilers, tackle, apparel and furniture, is an ocean going cargo vessel of American documentation, and is now lying at the port of Seattle, Washington, within the district and jurisdiction of the above-entitled court.

IV.

That on or about November 22, 1929, libelant Krauss Bros. Lumber Company entered into a booking contract with respondent Dimon Steamship Corporation, a copy of which is attached to this libel, marked Exhibit "A," under the terms of which the respondent Dimon Steamship Corporation confirmed libelant's engagement of space on the respondent steamship "Pacific Cedar," for the loading, on or about January 17, 1930, at Puget Sound and Grays Harbor ports on the Pacific Coast, and the shipment to Philadelphia and New York on the Atlantic Coast, of approximately 2500 M feet of lumber at an agreed rate of freight of $10 per M feet, said booking contract containing a provision that in the event a regular intercoastal carrier moved similar cargo at a lower rate, [5] such lower rate was to be applied to the shipments by libelant under the said booking contract, Exhibit "A."

V.

That under the provisions of and in accordance with the aforementioned booking contract, Exhibit "A," the libelant, between January 18 and January 25, 1930, at Puget Sound and Grays Harbor ports on the Pacific Coast of North America, loaded upon respondent steamship "Pacific Cedar," 1,465,730 feet of lumber, net measurement, which lumber was carried by said respondent steamship "Pacific Cedar," to the Atlantic Coast of the United States and discharged at the ports of New York, Philadelphia, and Baltimore, between

the 1st and 20th day of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent Dimon Steamship Corporation and the respondent S. S. "Pacific Cedar" demanded, received and collected from libelant the sum of $14,657.30, the freight on the aforementioned shipment at the rate of $10 per M feet.

VI.

That in the month of January, 1930, a regular intercoastal carrier, the Luckenbach Steamship Company, moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to wit, a rate of $8.50 per M feet, net measurement.

VII.

That the agreed freight upon libelant's shipment on the respondent steamship "Pacific Cedar" at the rate of $8.50 per M feet, which was the rate charged by said regular intercoastal carrier on similar cargo, amounted to $12,458.71 instead of the $14,657.30 demanded and collected by respondents from libelant for the freight on said shipment. [6]

VIII.

That before the commencement of this proceeding libelant has demanded from respondents the sum of $2,198.00, the difference between the freight collected by respondents on the aforementioned shipment and the freight actually due under the booking agreement, Exhibit "A," and that respondents have wholly failed, refused and neglected to repay libelant the said sum of $2,198.00, or any

portion thereof, which sum of $2,198.00, with interest at the rate of 6% per annum from the 20th day of March, 1930, is now due and owing from respondents to libelant.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant, Krauss Bros. Lumber Company, prays that process *in rem* in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and that all persons interested therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this court may be pleased to decree to libelant its damages aforesaid, together with interest and costs of suit, and that said respondent steamship "Pacific Cedar," her engines, boilers, tackle, apparel and funiture, may be condemned and sold to pay the same; and libelant also prays that process *in personam* in due form of law may issue against respondent Dimon Steamship Corporation, and that said respondent Dimon Steamship Corporation may be cited to appear and answer under oath all and singular [7] the matters aforesaid, and that this Honorable Court may be pleased to decree to libelant the damages, as aforesaid, with interest and costs of suit, and that libelant may have such other and further relief in the

premises as in law and justice it may be entitled to receive.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libelant.
Office and Post Office Address:
540 Central Building,
Seattle, Washington.

United States of America,
State of Washington,
County of King,—ss.

Lane Summers, first being duly sworn, on oath states: That he is secretary of Krauss Bros. Lumber Company, a corporation, the libelant in the foregoing libel, and makes this verification for and on its behalf; that he has read said libel, knows the contents thereof, and believes the allegations thereof to be true.

LANE SUMMERS.

Subscribed and sworn to before me this 18th day of May, 1931.

[Seal] G. H. BUCEY,
Notary Public in and for the State of Washington,
Residing at Seattle. [8]

EXHIBIT "A."

DIMOND STEAMSHIP CORPORATION INTERCOASTAL SERVICE.

Percy S. Laing Shipping Company, Inc.,
General Agents,
1015 Alaska Building,
Seattle, Washington.

New York, November 22, 1929.

Messrs. Krauss Bros. Lumber Company,
230 Park Avenue,
New York City.

Dear Sirs:

We confirm, subject to conditions hereinafter stated, your engagement of space on the American S/S "PACIFIC CEDAR," Voy. 10 E. B. expected to be ready to load about January 17, 1930.

Commodity and Quantity: 2500 M ft. Lumber—usual Atlantic Coast specifications; not exceeding 40 ft. in length.

Loading Port: Puget Sound/Grays Harbor.

Rate of Freight: $10.00 per M. ft. net measurement.

Destination: Philadelphia/New York.

Remarks: No shift to load or discharge for less than 500 M. ft.

P. L. I. B. Certificates and mill specifications to be furnished for each lot.

In event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied.

1. Cargo to be delivered alongside, and to be taken from alongside within reach of ship's tackles as fast as steamer can handle; terminal charges, unless otherwise specifically provided, shall be assessed against cargo. When lumber is delivered at open piers, all charges, including wharfage in excess of legal wharfage on ship or cargo, stowage in cars, on lighters and handling or piling on wharf, are for consignee's account. No deliveries of lumber to be made at closed piers. Steamer reserves the right to discharge at any pier or piers within customary lighter limits as in effect by all railroads. Where specified discharge berth is named herein, such berth to be available when steamer is ready to discharge or steamer has option of discharging at another berth or into lighters, all expenses for such discharge to be for account of cargo.

2. Dates named are as nearly correct as can now be estimated and are not guaranteed.

3. This engagement is contingent upon the safe arrival of vessel in loading port in fit condition to load cargo.

4. Carrier at its option may ship the above cargo by any other [9] vessel equivalent in classification, either steam or motor being interchangable.

5. The carrier does not assume the care, custody, control or safety of, and shall not be liable for, the cargo until it is loaded on board the vessel, nor for demurrage, storage or any other charges whatsoever that may accrue against shipment while awaiting delivery on board vessel.

6. Timbers or lumber over 40 feet in length, not accepted under this engagement unless specially arranged for herein. Vessel to have the privilege of carrying all or any portion of lumber on deck, unless otherwise specified herein.

7. Cargo to be delivered when required by the vessel and within reach of ship's tackle according to the custom of the port.

8. Upon the cargo being loaded on the vessel it shall be carried subject to the terms, exceptions and conditions of the carrier's regular bill of lading, which shipper hereby agrees to accept and be bound by.

9. If arrival of vessel in proper condition to safely receive, care for and carry the above cargo is delayed, hindered or prevented by causes beyond carrier's control, including strikes, lockouts, Acts of Governments and of offices and crews of vessels, the carrier shall have the option of cancelling this contract, or of repairing said vessel within a reasonable time and prosecuting the voyage, or of substituting another therefor.

10. This contract is not assignable or space covered hereby is not transferable without the written consent of the carrier being first obtained, and may be cancelled by the carrier if it is assigned or space transferred without such consent.

11. If shipper cancels or fails to ship by said steamer or substitute without the written consent of the carrier, shipper shall be responsible to carrier for loss of revenue to vessel.

12. This confirmation of engagement when

signed becomes a binding contract which cannot be altered or cancelled except by mutual consent in writing.

DIMON STEAMSHIP CORPORATION.
By (Signed) J. W. CHAPMAN.

Accepted:

KRAUSS BROS. LUMBER CO.

Filed May 18, 1931. [10]

(Title of Court.)

MONITION AND ATTACHMENT.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, a libel hath been filed in the United States District Court for the Western District of Washington, on the 18th day of May, in the year of our Lord one thousand nine hundred and 29, by KRAUSS BROS. LUMBER COMPANY, a Corporation, Libelant, vs. The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation, Respondents, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf be made, and that all persons interested in the said "Pacific Cedar," or vessel, her tackle, etc., may be cited in general and special to answer the premises and all proceedings being had that the said "Pacific Cedar" or vessel, her tackle, etc., may for the causes in the said libel men-

tioned, be condemned and sold to pay the demands of the libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said "Pacific Cedar," or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said court, to be held at Seattle, in the Western District of Washington, on the 4th day June, A. D. 1931, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

WITNESS, the Hon. GEORGE M. BOURQUIN, Judge of said court, at the city of Seattle, in the Western District of Washington, this 18th day of May, in the year of our Lord one thousand nine hundred and 31, and of our Independence the one hundred and fifty-fifth.

[Seal]

ED. M. LAKIN,
Clerk.

By T. W. Egger,
Deputy Clerk.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libellant.

Office of U. S. Marshal,
Western District of Washington,—ss.

In obedience to the within monition, I attached the S.S. "Pacific Cedar" therein described on the 18 day of May, 1931, and have given due notice to all persons claiming the same that this Court will, on the 4th day of June, 1931 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof should no claim be interposed for the same. And that on the 19 day of May, 1931, I released the said vessel upon receiving a notice of bonding signed by the Clerk of the U. S. District Court.

Date May 18, 1931.

CHARLES E. ALLEN,
U. S. Marshal.
By WALTER BOGAN,
Deputy Marshal.

MARSHAL'S FEES AND EXPENSES:

	Dollars	Cents
For serving Attachment and Monition.....	2.00	
Miles traveled....., at.....cents per mile— Expense		.20
Preparing Notice of Seizure for posting.....		
Preparing Copy of Notice of Seizure for Publisher		
Publishing Notice of Seizure.....		
Posting Notice of Seizure.....		
Percentage on $..... at .....per cent.....		

	Dollars	Cents
Keeper's fees.....day at $2.50 per day.....	....	
Releasing vessel	.50	
Total	2.70	

Return filed July 11, 1931.

Repayment of difference on freight chgs. $2,198.00 plus interest.

....,

Proctor for Libellant. [11]

CITATION.

No. 13,090.

Western District of Washington,—ss.

The President of the United States of America to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS a libel hath been filed in the United States District Court for the Western District of Washington, on the 18th day of May, A. D. 1931, by KRAUSS BROS. LUMBER COMPANY, a Corporation, Libelant, vs. The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation, Respondents, in a certain action, civil and maritime, for repayment of difference in freight charges therein alleged to be due and owing from respondents to said libellant, amounting to Two Thousand One Hundred Ninety-eight and no/100ths Dollars ($2,198.00), plus interest at 6% from March 20, 1930, and praying that a

citation may issue against the said respondent, pursuant to the rules and practice of this court:

NOW THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your district, that it be and appear before the said District Court, on Thursday, the 4th day of June, A. D. 1931, at ten o'clock in the forenoon of said day, at the court-room thereof, at Seattle, then and there to answer the said libel, and to make its allegations in that behalf.

And have you then and there this writ, with your return endorsed thereon.

WITNESS, the Hon. GEORGE M. BOURQUIN, Judge of said court, at the city of Seattle, in said Western District of Washington, this 18th day of May, A. D. 1931.

[Seal] ED. M. LAKIN,
Clerk.
By T. W. Egger,
Deputy Clerk.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libellant.

MARSHAL'S RETURN.

Office of U. S. Marshal,
Western District of Washington,—ss.

I hereby certify that I served the within citation at Seattle, Washington, on the 18 day of May, 1931, by then and there delivering to and leaving with Percy Lang, Freight Agent for the Dimon

S. S. Co., at said time and place, a duly certified copy thereof.

CHARLES E. ALLEN,
United States Marshal.
By WALTER BOGAN,
Deputy Marshal.

MARSHAL'S FEES:

	Dollars	Cents
Service	2.00	
Mileage	.12	
Expenses		
Total Charges	2.12	

Return filed May 18, 1931. [12]

(Title of Court and Cause.)

LIBELANT'S STIPULATION FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS: That we, Krauss Bros. Lumber Company, a corporation, as principal, and American Surety Company of New York, a corporation authorized to do a surety business within the State of Washington, as surety, are held and firmly bound unto whom it may concern, in the sum of Two Hundred and Fifty Dollars ($250.00) for the payment of which sum well and truly to be made we do hereby bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that,

WHEREAS, libel has been, or is about to be

filed in the above-entitled court, upon this 18th day of May, 1931, by the above-named libelant against the above-named respondents for the causes in said libel alleged.

NOW, THEREFORE, if the above-named principal shall pay all costs and expenses which shall be awarded against it by final decree of said court in said cause, or by any interlocutory order in the progress of said cause, or, in case of appeal by the appellate court, then this obligation shall be void; otherwise it shall remain in full force.

Dated this 18th day of May, 1931, at Seattle, Washington.

KRAUSS BROS. LUMBER COMPANY,
[Seal] By LANE SUMMERS,
Its Secretary,
(Principal).

AMERICAN SURETY COMPANY OF NEW YORK,
By A. E. KRULL.
A. E. KRULL,
Res. Vice-Pres.,
[Seal] Attest: J. A. TOMBERLIN,
Res. Asst. Secy.,
(Surety).

Filed May 18, 1931. [13]

(Title of Court and Cause.)

CLAIM.

To the Honorable Judge of the Above-entitled Court:

The Dimon Steamship Corporation, a corporation, as owner of the above-named vessel "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, intervening for its interest as such owner, now appears before this Honorable Court by and through Messrs. Bogle, Bogle & Gates, its proctors, and hereby claims said vessel, her engines, boilers, tackle, apparel and furniture and PRAYS that the said Dimon Steamship Corporation, a corporation, be permitted to defend accordingly, and that this court decree restitution to it, the said Dimon Steamship Corporation, a corporation, claimant of the said vessel "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and otherwise right and justice administer in the premises.

DIMON STEAMSHIP CORPORATION, a Corporation.

By BOGLE, BOGLE & GATES,

Its Proctors.

Filed May 19, 1931. [14]

(Title of Court and Cause.)

STIPULATION FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Dimon Steamship Corporation, a corporation, as principal, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto whom it may concern in the sum of Two Hundred Fifty Dollars ($250.00) for the payment of which sum well and truly to be made they do hereby bind themselves and their respective successors and assigns jointly and severally firmly by these presents.

The condition of this obligation is such that,

WHEREAS, a libel has been filed in the above-entitled court by the above-named libellant against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture for a cause of contract of affreightment, civil and maritime, and

WHEREAS, the above-named principal has filed its claim in the above-entitled court in the above cause, claiming the said vessel, her engines, boilers, tackle, apparel and furniture, and has applied for a release of said vessel from the custody of the United States Marshal for the Western District of the State of Washington,

NOW THEREFORE, if the above bounden principal shall abide by and pay all costs and expenses

which shall be awarded against it by the decree of the above-entitled court in the above cause, or by any interlocutory order of said court in the progress of said cause, or in the case of appeal by any appellate court, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF, said principal has hereunto subscribed its name and said surety has hereunto subscribed its name and affixed its seal this 19th day of May, 1931.

DIMON STEAMSHIP CORPORATION, a Corporation,
By PERCY S. LAING SHIPPING CO., INC.,
Agents [15]
By PERCY S. LAING,
President,
Principal.

NATIONAL SURETY COMPANY,
a Corporation,
[Seal] J. H. LOBDELL,
Attorney-in-fact,
Surety.

Filed May 19, 1931. [16]

(Title of Court and Cause.)

RELEASE BOND.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Dimon Steamship Corporation, a corporation, as principal, and National

Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States marshal for the Western District of Washington, in the sum of Three Thousand Dollars ($3,000.00) to be paid to said marshal, for the payment of which well and truly to be made they do hereby bind themselves and their respective successors and assigns jointly and severally firmly by these presents.

The condition of this obligation is such that, WHEREAS a libel has been filed in the above-entitled court by the above-named libellant against the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, for the alleged sum of Twenty-one Hundred Niney-eight Dollars ($2,198.00) and interest, on which process of attachment has issued, and the said vessel, her engines, boilers, tackle, apparel, and furniture are now in the custody of the United States marshal for the Western District of Washington under said attachment, and

WHEREAS the above-named principal has applied for the discharge and release of said vessel, her engines, boilers, tackle, apparel and furniture from the custody of said United States marshal and has filed a claim in the above-entitled court in the said cause, claiming the said steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, and has also filed therein a stipulation

for costs pursuant to the rules and practices of this Honorable Court. [17]

NOW THEREFORE, if the above-bounden principal shall abide by and answer the decree of said court in the above cause, or in the case of appeal, the decree of any appellate court in the said cause, then this obligation shall be void, otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF said principal has hereunto subscribed its name and said surety has hereunto subscribed its name and affixed its seal this 19th day of May, 1931.

DIMON STEAMSHIP CORPORATION, a Corporation,
By PERCY S. LAING SHIPPING CO., INC.,
Agent,
By PERCY S. LAING,
President,
Principal.

NATIONAL SURETY COMPANY,
a Corporation.
[Seal] By J. H. LOBDELL.

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of May, 1931, before me, a notary public, appealed Percy S. Laing, known to me to be president of Percy S. Laing Shipping Co., Inc., Agent for Dimon Steamship Corporation, a corporation, named in and that executed the foregoing bond and acknowledged the said

instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument for and on behalf of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CLAUDE E. WAKEFIELD,
Notary Public in and for the State of Washington,
Residing at Seattle. [18]

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of May, 1931, before me, a notary public, appeared J. H. Lobdell, to me known to be the attorney-in-fact of National Surety Company, a corporation, the corporation named in and that executed the foregoing bond as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument for and on behalf of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] CLAUDE E. WAKEFIELD,
Notary Public in and for the State of Washington,
Residing at Seattle.

The sufficiency of the surety on the foregoing bond is hereby approved, and justification of surety waived, and notice of bonding waived.

Dated this 19th day of May, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libellant.

The sufficiency of the surety on the foregoing bond is hereby approved, this 19th day of May, 1931.

BOURQUIN,

Judge, United States District Court for the Western District of Washington, Northern Division.

Filed May 19, 1931. [19]

(Title of Court and Cause.)

EXCEPTIONS TO LIBEL.

To the Honorable Judges of the Above-entitled Court:

The exceptions of Dimon Steamship Corporation, a corporation, respondent and claimant above named and claimant of the steamship "Pacific Cedar," her engines, boilers, tackle, apparel and furniture, in the above-entitled cause respectfully show:

That the said libel filed herein is insufficient and is excepted to upon the following grounds, to wit:

I.

That the facts averred in the libel are insufficient to constitute a cause of action.

II.

That the facts averred in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

III.

That the facts averred in the libel do not give rise to any maritime lien upon the steamship "Pacific Cedar" and that an action *in rem* against said vessel will not lie.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant, Dimon Steamship Corporation, a Corporation.

Date: June 18,——.

Received copy of within exceptions.
HAYDEN, MERRITT, SUMMERS & BUCEY,
For Libellant.

Filed Jun. 18, 1931. [20]

DECISION.

Filed July 14, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY, for Libellants,

BOGLE, BOGLE & GATES, for Respondents.

NETERER, District Judge.—The three cases brought by the same libellant, Krauss Bros. Lbr. Co., against the "Pacific Cedar," "Pacific Oak," and "Pacific Fir," are submitted together.

The libels are practically the same. Each seeks to recover an amount alleged to be due under a provision contained in a contract at a given rate of affreightment per thousand feet, with a provision "in the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied." The libels were filed about seventeen months after the cargo was carried, delivered and paid for. It is alleged the cargo was carried, the freight was paid, and that "at the same time * * * a regular intercoastal carrier * * * moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate * * * ." There is no allegation in the libel giving conditions under which this shipment was made, whether a regular coastal shipment, or whether a "distress" shipment. The freight upon the cargo was paid without protest. Exceptions to the libel are filed in each case: (a) Facts alleged are insufficient to constitute a cause of action; (b) do not constitute a cause of action within the admiralty and maritime jurisdiction; (c) there is no maritime lien and no jurisdiction *in rem.*

The court must first determine its jurisdiction. The Constitution grants judicial power to the United States District courts in all cases of admiralty and maritime jurisdiction. Originally, the admiralty jurisdiction was but [21] another phrase for the power of the admiral, next in power to the monarch, and extended to nonadmiralty cases "beyond the sea." The ancient and time honored privilege of admiralty (Edward's Ad. Juris. 17), Smart vs. Wolf, 3 T. R. 348, does not

obtain under our Constitution. English Stat., 2, Henry IV, Chap. 2, provides " * * * Admirals shall not intermingle anything done in the realm but only of a thing done upon the sea." The added word, "maritime," in our law restricts admiralty to maritime service. In The Eclipse, 135 U. S. 599, at 608, the Court says: "The jurisdiction embraces all maritime contracts * * * and it depends in cases of contract upon the nature of the contract and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Peoples Ferry Co. vs. Beers, 61 U. S. 399 (20 How.), at 401. Admiralty has not power to draw within its jursidiction matters primarily nonmaritime. U. T. & L. Co. vs. N. Y. & B. L., 180 Fed. 902. Its jurisdiction is confined exclusively to maritime issues. The Ada, 250 Fed. 194; Grant et al. vs. Poillon et al., 61 U. S. 162 (20 How.). The libels are for money had and received, the contract of a special nature, for less charge on named contingencies, the contingency had not arisen and the freight was paid and the essence of the contract now claimed is for repayment and this is not maritime. Plummer vs. Wall, 4 Mason C. R. 380. The fact that the contingent agreement was included in the charter-party does not of itself make it a maritime contract. 91 Fed. 267.

The ship was liable to safely deliver the cargo, and the cargo was liable to the ship for carriage. The Freeman, 52 U. S. 182 (18 How.). There was a reciprocal pledge for service and compensation

between the ship and the cargo. Bulkley vs. Maumkeag S. C. Co., 66 U. S. 386 (24 How.); The Keokuk, 76 U. S. 517 (9 Wall.); The Maggie Hammond, 76 U. S. 435; The Belfort, 74 U. S. 624 (7 Wall.). The lein of the cargo owner upon the [22] ship is limited by the corresponding and reciprocal right of the ship owner upon the cargo. The ship and cargo each discharged the maritime obligation; every act having relation to maritime service was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive, but rests on the inquiry: May the claim for rebate on the alternate rate be separably enforced? Compagnie Francaise vs. Bonasse, 19 Fed. (2) 777. The liability of the ship for transportation, and the liability of the cargo for affreightment do not differ in their nature and legal effect. The ship has a personalty of her own, is competent to contract, is liable for her obligations and her torts. Tucker vs. Alexander, 183 U. S. 424, at 438. The cargo, as well, has a similar status, and after the cargo is delivered all claim of the ship on the cargo is ended and any claim by reason of contract for increase of carriage charge on contingency, with the cargo owner, could not be impressed upon cargo, but only asserted against the owner, and by the same token, when maritime relation ended by delivery of the cargo and payment of the freight, all claim for repayment on the contract between owners of cargo and owners of the ship upon separable contract, is not a lien upon the ship.

It was only a right to lessen the ship's lien on cargo for carriage to the amount of the rebate agreed on while the relation between ship and cargo obtained but on payment to the ship for the affreightment the owner alone is liable for the repayment on his contract. A maritime lien is a necessary basis for an admiralty proceeding *in rem*, and may be prosecuted in any district where the offending vessel is found. The Propeller Commerce, 66 U. S. 615. It is a claim for secret lien and would operate to the prejudice of general creditors, and is *strioti juris* (Osaka Shosen Kaisha, [23] vs. Pacific Export Lbr. Co., 260 U. S. 490). A maritime lien can be effected only by some visible contact with or occurrence relating to the service of the ship and must be a manifest and open, ocular, physical endeavor of maritime service which may serve as notice to the world of an existing claim. If the claims had been claimed as offset *pro tanto* to the carriage charge, before payment, admiralty no doubt would have drawn to it equitable principles and so decreed. N. Y. Dock Co. vs. S. S. Poznan, 274 U. S. 117. The principle of hypothecation is the basis of a maritime lien, and the hypothecation cannot apply upon secret agreements between the owners, *supra*, for repayment of freight on certain contingencies and after ending of reciprocal relation between ship and cargo. The period of reciprocal relation between ship and cargo is from the beginning and ending of the voyage,—the receipt of cargo and the delivery of cargo. Vandewater vs. Mills, 60 U. S. 82. Any status or relation *ante* or *post* maritime

service on a separable stipulation is nonmaritime. Admiralty has no jurisdiction of a contract to procure marine insurance. Marquard vs. French, 53 Fed. 603; Home Ins. Co. vs. Merchants Transp. Co., 16 Fed. (2) 372; and by the same token, it has no jurisdiction for repayment of carriage charge on the separable contract in issue on a contingent agreement between owners of ship and owners of cargo.

In principle, aside from the statute (sec. 24, J. C.—Title 28, U. S. C. A., sec 41, sub. 3), creating admiralty a prize court (enacted 1875 (18 Stat. 470), 1887 (24 Stat. 552), 1888 (25 Stat. 433), 1911 (36 Stat. 1091)), this action is not unlike an action for division of prize money under contract made on land and which is held not within admiralty jurisdiction. See cases in Vice-Admiralty and Admiralty by Judge Hough, The Oliver Cromwell (Castrid vs. Waddell), page 167 (New York, 1715–1758). [24]

Each libel is in the nature of *assumpsit* upon express contract made on land prior to carriage of cargo for rebate on carriage charges which have been paid, and is separable and can be separably enforced, and the actions are not maritime. Admiralty has not jurisdiction.

NETERER,
United States District Judge.

[Endorsed]: Filed Jul. 14, 1931. [25]

(Title of Court and Cause.)

PETITION FOR REHEARING.

Comes now libelant above named and petitions the above-entitled court for rehearing upon exceptions to libel filed in behalf of respondent and claimant Dimon Steamship Corporation, a corporation.

This petition is based upon the record in the above-entitled cause, together with libelant's memorandum of authorities presented and filed herewith.

Dated this 27th day of July, 1931, at Seattle, Washington.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Libelant.

Copy received on 7/27/31.

BOGLE, BOGLE & GATES,
Attorney for Claimant.

Filed Jul. 27, 1931. [26]

(Title of Court and Cause.)

DECISION.

HAYDEN, MERRITT, SUMMERS & BUCEY, for Libelant,

BOGLE, BOGLE & GATES, for Respondents and Claimant.

NETERER, District Judge.—The three last named cases were heretofore submitted and ex-

ceptions sustained. Petition for rehearing is filed. The first two cases are now submitted upon exceptions.

The libels are practically the same. Each seeks to recover an amount alleged to be due under a provision contained in a contract at a given rate of affreightment per thousand feet, with a provision "in the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate to be applied." The libels were filed about seventeen months after the cargo was carried, delivered, and paid for. It is alleged the cargo was carried, the freight was paid, and that "at the same time * * * a regular intercoastal carrier * * * moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate * * * ." There is no allegation in the libel giving conditions under which this shipment was made, whether a regular coastal shipment, or whether a "distress" shipment. The freight upon the cargo was paid without protest. Exceptions to the libel are filed in each case: (a) Facts alleged are insufficient to constitute a cause of action; (b) do not constitute a cause of action within the admiralty and maritime jurisdiction; (c) there is no maritime lien and no jurisdiction *in rem*.

The court must first determine its jurisdiction. The Constitution grants judicial power to the United States District Courts in all cases of admiralty and maritime jurisdiction. Originally, the admiralty jurisdiction was but another phrase

for the power of the admiral, next in power to the monarch, and extended to nonadmiralty cases "beyond the sea." The ancient and time honored privilege of [27] admiralty (Edward's Ad. Juris. 17), Smart vs. Wolf, 3 T. R. 348, does not obtain under our constitution. English Stat. 2, Henry IV, Chap. 2, provides: "* * * Admirals shall not intermingle anything done in the realm but only of a thing done upon the sea." The added word, "maritime," in our law restricts admiralty to maritime service. In The Eclipse, 135 U. S. 599, at 608, the Court says: "The jurisdiction embraces all maritime contracts * * * and it depends in cases of contract upon the nature of the contract and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Peoples Ferry Co. vs. Beers, 61 U. S. 399 (20 How.), at 401. Admiralty has not power to draw within its jurisdiction matters primarily nonmaritime. U. T. & L. Co. vs. N. Y. & B. L., 180 Fed. 902. Its jurisdiction is confined exclusively to maritime issues. The Ada, 250 Fed. 194; Grant et al. vs. Poillon et al., 61 U. S. 162 (20 How.). The libels are for money had and received, the contract of a special nature, for less charge on named contingency; the contingency had not arisen and the freight was paid, and the essence of the contract now claimed is for repayment, and this is not maritime. Plummer vs. Wall, 4 Mason C. R. 380. The fact that the contingent agreement was included in the charter-party does not of it-

self make it a maritime contract. Keyser vs. Blue Star S. S. Co., 91 Fed. 267.

The ship was liable to safely deliver the cargo, and the cargo was liable to the ship for carriage. The Freeman, 59 U. S. 182 (18 How.). There was a reciprocal pledge for service and compensation between the ship and the cargo. Bulkeley vs. Maumkeag S. C. Co., 66 U. S. 386 (24 How.); The Keokuk, 76 U. S. 517 (9 Wall.); The Maggie Hammond, 76 U. S. 435; The Belfort, 74 U. S. 624 (7 Wall.). The lien of the cargo owner upon the ship is limited by the corresponding and reciprocal right of the ship owner upon the cargo. The ship and cargo each discharged the maritime obligation; every act having relation to [28] maritime service was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive, but rests on the inquiry: May the claim for rebate on the alternate rate be separably enforced? Compagnie Francaise vs. Bonasse, 19 Fed. (2) 777. The liability of the ship for transportation, and the liability of the cargo for affreightment do not differ in their nature and legal effect. The ship has a personalty of her own, is competent to contract, is liable for her obligations and her torts. Tucker vs. Alexander, 183 U. S. 424, at 438. The cargo, as well, has a similar status, and after the cargo is delivered all claim of the ship on the cargo is ended and any claim by reason of contract for increase of carriage charge on contingency, with the cargo

owner, could not be impressed upon cargo, but only asserted against the owner, and by the same token, when maritime relation ended by delivery of the cargo and payment of the freight, all claim for repayment on the contract between owners of cargo and owners of the ship upon separable contract, is not a lien upon the ship. It was only the right to lessen the ship's lien on cargo for carriage to the amount of the rebate agreed on while the relation between ship and cargo obtained, but on payment to the ship for the affreightment the owner alone is liable for the repayment on his contract. A maritime lien is a necessary basis for an admiralty proceeding *in rem*, and may be prosecuted in any district where the offending vessel is found. The Propeller Commerce, 66 U. S. 615. It is a claim for secret lien and would operate to the prejudice of general creditors, and is *stricti juris* (Osaka Shosen Kaisha vs. Pacific Export Lbr. Co., 260 U. S. 490). A maritime lien can be effected only by some visible contract with or occurrence relating to the service of the ship and must be a manifest and open, ocular, physical endeavor of maritime service which may serve as notice to the world of an existing claim. If the claims had been claimed as offset *pro tanto* to the carriage charge, before payment, admiralty no doubt would have drawn to it equitable principles and so decreed. N. Y. Dock Co. vs. S. S. Poznan, 274 U. S. 117. The principle of hypothecation [29] is the basis of a maritime lien, and the hypothecation cannot apply upon secret agreements

between the owners, *supra,* for repayment of freight on certain contingencies and after ending of reciprocal relation between ship and cargo. The period of reciprocal relation between ship and cargo is from beginning and ending of the voyage,—the receipt of cargo and the delivery of cargo. Vandewater vs. Mills, 60 U. S. 82. Any status or relation *ante* or *post* maritime service on a separable stipulation is nonmaritime. Admiralty has no jurisdiction of a contract to procure marine insurance. Marquard vs. French, 53 Fed. 603; Home Ins. Co. vs. Merchants Transp. Co., 16 Fed. (2) 372; and by the same token, it has no jurisdiction for repayment of carriage charge on the separable contract in issue on a contingent agreement between owners of ship and owners of cargo. In Israel vs. Moore & McCormack Co., 295 Fed. 919, the master of the ship wrongfully exacted from the shipper carriage charges for cargo jettisoned, and therefore not delivered; it was a failure to safely deliver the cargo; jettison was the act of the ship by open, obvious conduct of its crew. The ship was liable for breach; it did not fulfill its promise. The instant claims are not predicated on any act of open, obvious conduct of the ship, but upon express contract between the owners of the cargo and the owner of the ship, which is separable.

In Church vs. Shelton, 5 Fed. Cas. 674 (No. 2714), the master of the ship conspired with wreckers to strand his ship and the owner of the cargo paid large sums for salvage. Admiralty had jurisdiction. The bill of lading, founded on con-

tract, was to convey safely the merchandise. The act of the master in stranding was open and obvious, and the owner and the ship were liable for the master's acts. The merchandise was not delivered, through the fraudulent acts of the master, whose acts were open, and obvious, and it was a maritime service. [30]

In Pillsbury Flour Co. vs. Interlake S. S. Co., 40 Fed. (2) 439, the contract included holding the cargo in storage after transportation on the water and before delivery. The relation between the shipper and the carrier had not ended, and could not end until the cargo was delivered, and this was by special agreement between the owners of the cargo and the owner of the ship, to which the ship was necessarily a party and the relation between carrier and shipper, not having ended by *deliver,* admiralty rightly assumed jurisdiction of the whole.

In The Oceano, 148 Fed. 131, by stipulation in the charger party for advance freight to the master, which was to be deducted from the freight on delivery of the cargo, by mistake a part was not deducted, and the court held refusal to pay on the part of the owner for advance freight was a breach of the charter-party and not separable. The claim did not rest on a contingency, but obtained from the beginning, interwoven with acts of the master, ship, and cargo and shipper. No act of a third party was required to give life to the claim, like happening of a contingency. In the case at bar, no act of the master gave life to the

claim, nor did the agreement between the owners of the ship and the owners of the cargo, but the act of another.

In principle, aside from the statute (sec. 24, J. C.—Title 28, U.S.C.A., sec 41, sub. 3), creating admiralty a prize court (enacted 1875 (18 Stat. 470), 1887 (24 Stat. 552), 1888 (25 Stat. 433), 1911 (36 Stat, 1091), this action is not unlike an action for division of prize money under contract made on land and which is held not within admiralty jurisdiction. See cases in Vice-Admiralty and Admiralty by Judge Hough, The Oliver Cromwell (Castrid vs. Waddell), page 167 (New York 1715-1758). [31]

Each libel is in the nature of *assumpsit* upon express contract made on land prior to carriage of cargo for repayment on carriage charges which have been paid, and is separable and can be separably enforced, and the actions are not maritime. Admiralty has not jurisdiction.

The motions for rehearing are denied, and the exceptions to libels are sustained. An order dismissing the libels may on notice be presented.

NETERER,
United States District Judge.

[Endorsed]: Filed Aug. 4, 1931. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 13,090.

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Libelant,

vs.

The Steamship "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture, and DIMON STEAMSHIP CORPORATION, a Corporation,

Respondents,

and

DIMON STEAMSHIP CORPORATION, a Corporation,

Claimant.

DECREE OF DISMISSAL.

Libelant above named having heretofore filed a libel in the above cause *in rem* against the steamship "Pacific Cedar" and *in personam* against Dimon Steamship Corporation, a corporation, secured the seizure of said vessel by the United States marshal; thereupon the claimant and respondent, Dimon Steamship Corporation filed its claim to said vessel and secured its release in due form, by filing herein a bond in the sum of $3,000.00; and the said respondent and claimant having thereafter excepted to the libel, and the whole thereof, on the

ground that admiralty had no jurisdiction of this said cause, and that no maritime lien existed against the respondent vessel by reason of the matters alleged in the libel, and the court having heard arguments by proctors for both parties, and the matter having been submitted upon briefs and duly considered by the Court; and the Court having thereafter rendered and filed herein its memorandum decision sustaining the exceptions to the libel and directing that an order dismissing the libel be entered herein, upon notice, and libelant having thereafter petitioned for rehearing and the matter being again submitted and considered by the Court, and the Court having filed a second memorandum decision, sustaining the exceptions to the libel, now therefore, upon notice duly given by Bogle, Bogle & Gates, proctors for respondent and claimant, it is [33]

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same is hereby dismissed on the following grounds, to wit: (1) That admiralty has no jurisdiction; (2) that no maritime lien exists; and that respondent and claimant, Dimon Steamship Corporation, have and recover from the libelant its costs and disbursements herein to be taxed in the sum of Sixty-five and 50/100 Dollars ($65.50).

Libelant requests and is allowed an exception to the foregoing decree.

Dated this 14 day of Sept., 1931.

JEREMIAH NETERER,
District Judge

Approved.

BOGLE, BOGLE & GATES,
Proctors for Claimant.

Copy of foregoing decree received; same is approved as to form only. Exception is hereby taken to said decree and each and every part thereof.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libelant.

Libelant's exception is hereby allowed.

NETERER,
District Judge.

Filed Sept. 18, 1931. [34]

NOTICE OF APPEAL.

To Dimon Steamship Corporation, a Corporation, as Respondent and as Claimant, and to Bogle, Bogle & Gates, Its Proctors, and to the Honorable JEREMIAH NETERER, Judge, and Ed. M. Lakin, Clerk of the Above-entitled Court:

You, and each of you, will please take notice that Krauss Bros. Lumber Company, a corporation, as libelant in the above-entitled cause, hereby appeals from that certain final decree, signed by the Honorable Jeremiah Neterer, Judge of the above-entitled court, upon September 14, 1931, and filed with the Clerk of said court in the above-entitled cause upon September 18, 1931, in favor of the respondents S.S. "Pacific Cedar," her engines, boilers,

tackle, apparel and furniture, and Dimon Steamship Corporation, a corporation, and in favor of claimant, Dimon Steamship Corporation, a corporation, and against said libelant, Krauss Bros. Lumber Company, a corporation, and hereby appeals from the whole of said final decree, and from each and every part thereof, and particularly from the following parts [35] thereof, to wit:

1. That part of said decree that dismisses the libel in the above-entitled cause;

2. That part of said decree that assigns as a ground for such dismissal that admiralty had no jurisdiction;

3. That part of said decree which assigns as a further ground for such dismissal that no maritime lien existed; and,

4. That part of said decree allowing against libelant judgment for costs and disbursements in the sum of $65.50;

to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14 day of October, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Libelant Krauss Bros. Lumber Company, a Corporation.

Filed Oct. 20, 1931. [36]

(Title of Court and Cause.)

ACKNOWLEDGMENT OF SERVICE.

Due service of notice of appeal, copy of which is hereto attached and by this reference made a part hereof, and receipt of copy of such notice of appeal after the filing of the same on the 14 day of October, 1931, in the office of the Clerk of the above-entitled court, is hereby admitted this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [37]

PETITION FOR APPEAL.

To the Above-entitled Court, and the Honorable Judges Thereof:

Krauss Bros, Lumber Company, a Corporation, libelant above named, being aggrieved by that certain final decree, signed September 14, 1931, and filed in the above-entitled cause September 18, 1931, claims an appeal from said decree, and hereby petitions and prays that upon notice of appeal, presented and filed herewith, such appeal may be allowed, and citation on appeal be issued.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company, a Corporation.

Copy of above petition for appeal received and service thereof admitted upon this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [38]

ASSIGNMENTS OF ERROR.

Krauss Bros. Lumber Company, a corporation, appellant, assigns errors in the rulings and proceedings in the above-entitled cause on the part of the trial court, the District Court of the United States for the Western District of Washington, Northern Division, as follows:

1. That said trial court erred in ruling by its memorandum decision, filed July 14, 1931, that no maritime lien existed in favor of libelant and against the respondent SS. "Pacific Cedar," as a result of the claim and cause of action alleged by the libel.

2. That said trial court erred in ruling that no maritime cause of action was alleged by said libel, as a result of which the trial court, sitting in admiralty, had no jurisdicton of the subject matter of the libel. [39]

3. That said trial court erred in ruling by its memorandum decision, filed August 4, 1931, that libelant was not entitled to a rehearing, and in adhering to the trial court's former decision.

4. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter

filed Sept. 18, 1931, by adjudging that no maritime lien existed in favor of libelant and against the respondent SS. "Pacific Cedar."

5. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by adjudging that admiralty had no jurisdiction of the subject matter of the cause.

6. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by dismissing libelant's libel and cause of action therein alleged.

7. That said trial court erred by its final decree of dismissal, signed Sept. 14, 1931, and thereafter filed Sept. 18, 1931, by awarding costs against libelant and in favor of claimant.

Dated this 14 day of October, 1931.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant.

Filed Oct. 20, 1931. [40]

ORDER UPON PETITION FOR APPEAL.

The above-entitled cause coming on duly and regularly for hearing before the above-entitled court, the undersigned Judge presiding, this day, upon presentation of petition for appeal by Krauss Bros. Lumber Company, a corporation,—

NOW, THEREFORE, it is hereby CONSIDERED, ORDERED AND ADJUDGED that said

petition for appeal be allowed as prayed, and that citation on appeal issue.

Done this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

Approved as to form this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [41]

STIPULATION AS TO APPEAL.

It is hereby stipulated by and between Krauss Bros. Lumber Company, a corporation, appellant, and Dimon Steamship Corporation, a corporation, appellee, as follows:

1. That apostles containing all matters designated by the praecipe herein prepared in behalf of appellant, shall be sufficient record on appeal.

2. That there may be omitted from such apostles the following:

(a) The full title of various pleadings, the full file-mark thereon, and the verification thereof, it being sufficient that the record on appeal contain a plain designation of the various pleadings and papers, together with a notation of the date when the same were filed and/or served.

3. That notwithstanding the expiration of the period of the present term of the above-entitled court in which final [42] decree in the above-

entitled cause was made and entered, appeal therefrom may be perfected and prosecuted thereafter, and the present term of court may be deemed to be continued and unexpired for such purpose.

4. That American Surety Company of New York, a corporation, as surety upon the stipulation for costs filed by appellant, Krauss Bros. Lumber Company, a corporation, at the time of the institution of the above-entitled cause, need not join or be joined as a party appellant herein.

5. That upon the authority hereof, without notice, order in conformity herewith and in approval hereof, may be entered by the above-entitled District Court or by the United States Circuit Court of Appeals for the Ninth Circuit, as may be appropriate.

HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant Krauss Bros. Lumber Company.

BOGLE, BOGLE & GATES,

Proctors for Appellee Dimon Steamship Corporation.

Filed Oct. 20, 1931. [43]

ORDER AS TO APPEAL.

Upon oral motion of appellant herein, stipulation as to appeal on file in the above-entitled cause having been examined,—

NOW, THEREFORE, it is hereby ORDERED that the same be, and it hereby is, approved and the procedure therein contemplated authorized.

Done in open court this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

Approved this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Appellee Dimon Steamship Coporation.

Filed Oct. 20, 1931. [44]

MOTION FOR ORDER STAYING EXECUTION AND FIXING SUPERSEDEAS BOND.

Comes now Krauss Bros. Lumber Company, a corporation, libelant herein, and moves the Court for an order staying execution pending appeal from final decree in the above-entitled cause, and fixing the amount of supersedeas bond in the sum of Five Hundred Dollars.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company, a Corporation.

Copy received on 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [45]

ORDER STAYING EXECUTION AND FIXING AMOUNT OF SUPERSEDEAS BOND.

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, this day, upon motion for stay of execution pending appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and fixing the amount of supersedeas bond,—

NOW, THEREFORE, IT IS HEREBY ORDERED: That the sum of Five Hundred Dollars ($500.00) be, and the same hereby is, fixed as the amount of bond on appeal, to serve both as cost bond and supersedeas bond, such sum being declared reasonable and adequate security, and that upon the filing of cost and supersedeas bond on appeal, proper as to form and surety, in the sum of $500.00, execution upon final decree heretofore entered in the above-entitled cause shall be stayed [46] during the pendency of the appeal.

Done this 14 day of October, 1931.

JEREMIAH NETERER,
U. S. District Judge.

The foregoing order hereby approved.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20. 1931. [47]

NOTICE OF FILING BOND ON APPEAL.

To Dimond Steamship Corporation, a Corporation, and to Bogle, Bogle & Gates, Its Proctors:

You, and each of you, will please take notice that upon the 14 day of October, 1931, Krauss Bros. Lumber Company, a corporation, appellant in the above-entitled cause, filed in the office of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a cost and supersedeas bond in the total sum of Five Hundred Dollars ($500.00), a copy of which bond is herewith served upon you; and that the surety upon said cost and supersedeas bond on appeal is the American Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, of which it is a resident, the home office of said corporation being located at New York City. [48]

Dated this 14 day of October, 1931, at Seattle, Washington.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant Krauss Bros. Lumber Company, a Corporation.

PROOF OF SERVICE.

Copy of the foregoing notice of filing cost and supersedeas bond on appeal, together with copy thereof after the filing of such bond, received and

due service thereof admitted upon this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Dimon Steamship Corporation.

Filed Oct. 20, 1931. [49]

COST AND SUPERSEDEAS BOND.

KNOW ALL PERSONS BY THESE PRESENTS: That we, Krauss Bros. Lumber Company, a corporation, as Principal, and American Surety Company of New York, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Dimon Steamship Corporation, a corporation, Respondent and Claimant in the above-entitled cause, in the sum of Five Hundred Dollars ($500.00), to be paid to said Dimon Steamship Corporation, a corporation, its successors and assigns, for the full and complete payment of which, well and truly to be made, we bind ourselves, and each of us, our successors and assigns, jointly and severally firmly by these presents.

Signed and sealed this 7th day of October, 1931.

WHEREAS, said Krauss Bros. Lumber Company, a corporation, as libelant, has appealed to the United States Circuit Court of [50] Appeals for the Ninth Circuit from a certain final decree of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause, signed by the

Honorable Jeremiah Neterer, Judge of said court, upon September 14, 1931, and thereafter, on September 18, 1931, filed with the Clerk of said court, said decree being in favor of Dimon Steamship Corporation, a corporation, as respondent and claimant, and against said Krauss Bros. Lumber Company, a corporation, as libelant, wherein and whereby said cause is dismissed, and judgment is granted in favor of said respondent and claimant, and against said libelant, for costs and disbursements taxed in the sum of $65.50; and

WHEREAS, Krauss Bros. Lumber Company, a corporation, during the progress of such appeal desires to stay execution of said decree,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal, Krauss Bros. Lumber Company, a corporation, as appellant in the above-entitled cause, shall prosecute said appeal with effect, and shall pay all costs which may be awarded against it if the appeal is not sustained, and shall also abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, or whatever decree may be rendered on the mandate of said appellate court by said District Court; then this obligation shall be void; otherwise the same shall continue in full force and effect.

KRAUSS BROS. LUMBER COMPANY,
a Corporation.

[Seal] By LANE SUMMERS,
Secy. [51]

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE,
Its Resident Vice-President.

[Seal] Attest: J. M. TOMBERLIN,
Its Resident Assistant Secretary.

Signed, sealed, delivered and acknowledged by and in behalf of said surety this 7th day of October, 1931, before me the undersigned notary public.

[Seal] FRED S. MERRITT,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond is hereby approved as a cost and supersedeas bond, with respect to form, amount, and surety thereon.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant, Dimon Steamship Corporation, a Corporation.

The foregoing bond is hereby approved as a cost and supersedeas bond, with respect to form, amount, and surety thereon.

JEREMIAH NETERER,
U. S. District Judge.

Filed Oct. 20, 1931. [52]

PRAECIPE FOR APOSTLES ON APPEAL.

To Ed. M. Lakin, Clerk of the Above-entitled Court:

You will please prepare and certify a true copy of certain papers on file in your office, and of record in the above-entitled cause, as apostles on appeal, to wit:

1. Libel, filed May 18, 1931.
2. Libelant's stipulation for costs, filed May 18, 1931.
3. Claim of Dimon Steamship Corporation, filed May 19, 1931.
4. Claimant's stipulation for costs, filed May 19, 1931.
5. Release bond, filed May 19, 1931.
6. Claimant's exceptions to libel, filed June 18, 1931.
7. Monition and attachment, filed July 11, 1931.
8. Citation, filed July 11, 1931.
9. Court's memorandum decision, filed July 14, 1931.
10. Libelant's petition for rehearing, filed July 27, 1931. [53]
11. Court's memorandum decision, denying rehearing, filed August 4, 1931.
12. Decree of dismissal, signed Sept. 14, 1931.
13. Statement.
14. This praecipe.
15. Assignments of error.
16. All other appeal papers.

HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Krauss Bros. Lumber Company,

Copy received this 14th day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Krauss Bros. Lumber Company.

Filed Oct. 20, 1931. [54]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from 1 to 54, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true, and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [55]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 121 folios at 15¢ per folio..... $18.15
Appeal fee (Sec. 5 of Act) 5.00
Certificate of Clerk to Transcript of Record .50

Total $23.65

I further certify that the above cost of preparing and certifying record, amounting to $23.65 has been paid to me by proctors for the appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 5th day of November, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.

By T. W. Egger,
Deputy. [56]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to Dimon Steamship Corporation, a Corporation, as Respondent and Claimant, and Bogle, Bogle & Gates, Its Proctors, GREETINGS:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, upon the 10 day of November, 1931 (not exceeding thirty days from the date hereof), pursuant to appeal to said court, duly filed and taken in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein Krauss Bros. Lumber Company, a corporation, is appellant, and Dimon Steamship Corporation, a corporation, is appellee; then and there to show [57] cause, if any there be, why the final decree of the District Court of the United States for the Western District of Washington, Northern Division, signed by the Honorable Jeremiah Neterer, Judge of said court, upon September 14, 1931, and thereafter filed with the Clerk of said court upon September 18, 1931, as to which such appeal is filed and taken, should not be corrected and reversed, and why speedy justice should not be done in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, this 14 day of October, 1931.

[Seal] JEREMIAH NETERER,
U. S. District Judge.

Due service of the foregoing citation, and receipt of copy thereof after the filing of the same

in the office of the Clerk of the above-entitled court, is hereby admitted this 14 day of October, 1931.

BOGLE, BOGLE & GATES,
Proctors for Respondent and Claimant.

Filed Oct. 20, 1931. [58]

[Endorsed]: No. 6660. United States Circuit Court of Appeals for the Ninth Circuit. Krauss Bros. Lumber Company, a Corporation, Appellant, vs. Dimon Steamship Corporation, a Corporation, Claimant of the SS. "Pacific Cedar," Her Engines, Boilers, Tackle, Apparel and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 7, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6660

United States
Circuit Court of Appeals
For the Ninth Circuit

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Appellant,

vs.

DIMON STEAMSHIP CORPORATION, a Corporation, Claimant of the S. S. "PACIFIC CEDAR," Her Engines, Boilers, Tackle, Apparel and Furniture,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Friday, the eighteenth day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above case argued by Mr. Claude E. Wakefield, counsel for the appellee, and submitted on brief on behalf of appellant, with leave to counsel for appellant to file a reply brief on or before July 15, 1932.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the eighth day of September, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Before: WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

WILBUR, Circuit Judge:

The appellant filed a libel in rem against the steamship "Pacific Cedar," and in personam against her owner. The trial court sustained the exception to the libel filed by the respondent upon the ground that admiralty was without jurisdiction over the matter and dismissed the libel. From this decree the libellant takes this appeal.

The object of the action is to recover an overpayment of freight made by the libellant to the respondent. The claim arises from the contingent character of the contract of affreightment contained in the "booking agreement" dated November 22, 1929, by which the respondent undertook to carry the libellant's lumber loaded about January 17, 1930, at Puget Sound and Grays Harbor to Philadelphia or New York for $10 per thousand feet net measurement, but, "In the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate is to be applied." The lumber was loaded between January 18 and January 25, 1930, and was discharged at New York, Philadelphia and Baltimore, between March 1 and 20, 1930. During that period respondent demanded and received $14,657.30 freight thereon, being at the rate of $10 per thousand net measurement. In the month of January a regular intercoastal carrier, the Luckenbach Steamship Company, moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at the rate of $8.50 per thousand feet, consequently the freight that should have been charged and collected by respondent at this lower rate was $12,458.71, wherefore libellant seeks to collect the difference of $2198 with interest at six per cent per annum from March 20, 1930. There is no allegation that either party to the contract of affreightment knew of the carriage of lumber at the lower rate by the Luckenbach Steamship Company, nevertheless the respondent demanded

and received the higher rate. The position of the appellee is thus stated in its brief:

> "Appellee admits here, and has never contended otherwise, that a contract of affreightment is maritime. From this fact, however, it does not follow that the matter before the court in this case is maritime, merely because it is based upon a clause physically contained in a contract of affreightment. Such appears to be appellant's contention.
>
> A contract of affreightment is within admiralty jurisdiction because it is primarily a maritime contract with respect to the ship, cargo and freight. Any breach of such contract in connection with the loading, carriage and safe delivery of cargo having to do with the ship, cargo or freight, is certainly within admiralty jurisdiction, but after the affreightment has been fully performed by safe delivery, according to the terms of the contract, and freight voluntarily paid by the shipper, an action by the shipper (appellant here) to recover from the carrier a sum of money alleged to be due by reason of a contingent claim to-wit: that some other intercoastal carrier carried similar cargo at a lesser rate, and not based upon a claim connected in any way with the maritime features of such contract, or the duties imposed or arising out of said contract, is certainly not maritime. Such action is one

in assumpsit to recover money had and received."

We think it clear, however, that the contingent agreement is not so remote from the contract of affreightment as appellee indicates. It is not an agreement to rebate freight earned but fixes the freight by reference to the conduct of competitors. The agreement was to pay $8.50 and no more, as it turned out, consequently the demand by the appellee for payment in excess of that amount was unauthorized and was clearly a violation of the express terms of the contract, although apparently neither party at that time knew of that fact.

As we understand it, appellee concedes that had the appellant raised the contention that the freight rate was $8.50 per thousand before delivery, and had appellee compelled the payment of $10 per thousand as a condition to delivery, admiralty would have jurisdiction of the action to recover the overpayment thus exacted as a condition to delivery. At any rate, this court has decided in *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 F. (2d) 401, 402, that excessive charges thus exacted can be recovered in admiralty. District Judge Bean, speaking for this court, there said:

"It is urged by the appellant that the matter here involved is not cognizable in admiralty. But the issue between the parties cannot be determined without a consideration and review of the terms of the bill of lading, and, as said by Gibson, District Judge, speak-

ing for the Court of Appeals in 286 Fed. 918: 'From time immemorial the construction of such contracts, and the determination of issues arising out of them, has been part of the duties of courts of admiralty.' 1 U. S. Shipping Bd. v. Banque Russo Asiatique. See, also, The G. A. Tomlinson (D. C.), 279 F. 736; The John Francis (D. C.), 184 F. 746; The Lake Eckhart (D. C.), 31 F. (2d) 804, 1924 A. M. C. 498."

The contract of affreightment is as definitely determined to be a maritime contract as is a charter party. For instance the Supreme Court in *Morewood, et al. v. Enequist,* 23 How. 491, 493, 16 L. Ed. 516, thus stated the matter:

"In the argument in this court, the counsel, without abandoning the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They did not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'

The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.

We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of The New Jersey Steamboat Company v. The Merchants' Bank of Boston (6 How. 334), was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated, both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard II to the present day—everything which the industry, learning and research of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and Act of Congress and cognizable in courts of admiralty by process either in rem or in personam."

In *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 68 L. Ed. 582, the Supreme Court had under consideration an action to recover money paid as charter hire where the vessel hired failed to make the voyage; the court held that the claim was within admiralty jurisdiction, and stated, at p. 120:

> "The claim to recover an amount paid under a charter party as charter hire is within the admiralty jurisdiction. Morewood v. Enequist, 23 How. 491, 16 L. Ed. 516."

In a more recent case (*Matson Nav. Co. v. U. S.*, 284 U. S. 352, decided January 4, 1932), where the plaintiff sought to recover compensation in the Court of Claims for increased wages and bonuses paid by it to the masters and crews of seven vessels operated by it for the United States, it was held that the agreement for the operation of the ships was maritime and that the Court of Claims was without jurisdiction to determine the matter which was within admiralty jurisdiction. If an action to recover unpaid charter hire is cognizable in admiralty after the charter party has expired, it would seem that an action to recover unpaid freight would likewise be within admiralty jurisdiction (see 36 *Cyc.* 312, § 5; *Thatcher v. McCulloh*, 23 Fed. Cas. No. 13,862), and if an action to recover additional freight would be so cognizable it is equally clear that an action to recover an overpayment would likewise be within admiralty jurisdiction. It is true that Judge Learned Hand in *Israel v. Moore and McCormick Co.*, 295 Fed. 919, decided April 8, 1920, held that freight overpaid by mistake of the consignee due to the fact that a portion of the cargo had been jettisoned, could not be recovered in admiralty because such recovery was based upon a legal fiction which implied a promise to repay the excessive charges,

when in fact no such agreement existed. He thus distinguished the case before him from that of *The Oceana* (D. C.), 148 Fed. 131, where the charterer sued to recover an overpayment of freight due to the failure of the ship to deduct certain payments made by the charterer, as had been agreed. In the case at bar we have an agreement in the contract of affreightment to deduct from the $10 rate any amount over the charge made by a regular intercoastal carrier for moving similar cargo to the East Coast. If there is a reasonable basis for this distinction between an express and an implied agreement to reduce freight, as applied to an overpayment of freight, the case at bar comes within the rule announced in *The Oceana,* supra, which Judge Hand thus distinguishes from his decision in *Israel v. Moore and McCormick Co.,* supra:

> "The ship [The Oceana] had agreed to deduct from the freight all disbursements paid by the charterer, who mistakenly overpaid her. The right of recovery rested upon the ship's unfilled promise, and could indeed have been so pleaded at law, the payment and mistake in payment being successively pleaded in a voidance as plea and replication. The right to sue in indebitatus assumpsit should not obscure that very obvious difference."

We do not find that the decision of Judge Hand has been cited on this point in any later case. In the case at bar, as we have pointed out, the amount

overpaid was exacted in violation of the express contract of affreightment, and the question of the amount of freight to be paid depends upon the interpretation of that contract.

We think it clear from the foregoing authorities that, where the agreement of affreightment, by or on behalf of the ship, required the transportation of the cargo for $8.50 per thousand feet of lumber and the ship exacts the greater rate of $10.00 per thousand feet, and the same is voluntarily paid by reason of mutual mistake at the time of delivery, admiralty has jurisdiction over an action to recover such overpayment in a libel in personam.

The question remaining is whether there is a maritime lien against the Steamship "Pacific Cedar" which can be enforced in admiralty in rem. The basis for a maritime lien upon the ship in cases involving a contract of affreightment is thus stated by the Supreme Court in *Vandewater v. Mills, The Yankee Blade,* 60 U. S. 82, 90:

> "This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty

assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11), that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration."

In the case of *Osaka Shosen Kaisha v. Pacific Export Lbr. Co.*, 260 U. S. 490, 499, this doctrine was reiterated by the Supreme Court, as follows:

"The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vandewater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the

cargo. See The Thomas P. Sheldon, 113 Fed. 779, 782, 783."

To enforce a lien against the ship where neither the owner or master of the ship on the one hand, or the owner of the cargo on the other, knew of the facts upon which the lien is predicated until after the right delivery of the cargo, and where no visible fact or occurrence would give notice of the lien to the public would press the doctrine of a maritime lien beyond reason and beyond authoritative decision. We concur in the conclusion of the trial judge that under the circumstances of this case no maritime lien exists on the ship.

The decree dismissing the libel in rem is affirmed and the dismissal of the libel in personam is reversed with directions to the trial court to enter a judgment against the Dimon Steamship Corporation for $2,198 with interest at six per cent from March 20, 1930.

(Endorsed:) Opinion. Filed September 8, 1932. Paul P. O'Brien, Clerk.

At a stated term, to-wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION ON PETITION FOR MODIFICATION OF OPINION, ETC.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause on petition of appellee for modification of opinion be forthwith filed by the clerk and that an order be entered in the minutes of this court in accordance therewith, and that the decree filed and entered September 8, 1932, be vacated and set aside.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

On Petition for Modification of Opinion.

Before: WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

WILBUR, Circuit Judge:

Appellee petitions for the modification of the order in so far as it directs an entry of a judgment against the Dimon Steamship Corporation for $2198, with interest at six per cent from March 20, 1930. The petitioner has apparently assumed throughout that in the event its exceptions to the jurisdiction of the admiralty Court were not sustained, it would have leave to file an answer. No appplication was made in this Court for leave to answer in the event that the order of the District Court sustaining the exceptions was reversed. In view of the fact that the hearing in this Court was a trial de novo, an order was made finally disposing of the matter by directing the entry of a judgment in favor of the appellant. It is evident from the petition that the appellee was taken by surprise by the order made. The appellant did not request or contend that the order of this Court, if predicated

upon a reversal of the order of the trial Court, should direct an entry of the judgment.

Appellee states in its petition, "Appellee has a defense in this case and one which will clearly defeat any recovery by the appellant." We are not yet advised of the nature of this defense.

Appellee will be given thirty days in which to appply to this Court for leave to file its proposed answer; ten days' notice of the application will be given to the appellant.

[Endorsed:] Opinion. Filed November 7, 1932. Paul P. O'Brien, Clerk.

At a stated term, to-wit; the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER ON PETITION FOR MODIFICATION OF OPINION.

Upon consideration of appellee's petition for modification of opinion of this court in above cause, rendered and filed on Sept. 8, 1932, and of appellant's reply thereto and of appellee's reply, and pursuant to the opinion this day rendered and filed, IT IS ORDERED that leave be, and hereby is granted appellee to apply to this court within thirty days for leave to file its proposed answer, upon at least ten days notice of the application being given to appellant.

IT IS FURTHER ORDERED that the decree filed and entered in this court in this cause on Sept. 8, 1932, be, and hereby is vacated and set aside.

At a stated term, to-wit, the October Term, A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twenty-second day of December, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable JULIAN W. MACK, District Judge.

[Title of Cause.]

ORDER GRANTING ANCILLARY RECEIVERS LEAVE TO FILE PROPOSED ANSWER, AND REMANDING CAUSE TO DISTRICT COURT, ETC.

Upon consideration of petition of Messrs. John Ambler and J. Raymond Tiffany, ancillary receivers of Dimon Steamship Corporation, etc., appellee herein, for leave to file an answer in this cause, and of the proposed answer, and of the objections of appellant thereto, and good cause therefor appearing, IT IS ORDERED that leave be, and hereby is granted said John Ambler and J. Raymond Tiffany, ancillary receivers, etc., to file said answer.

IT IS FURTHER ORDERED that this cause be, and hereby is remanded to the said District Court with directions to said District Court to try the issues raised thereby.

[Title of Court and Cause.]

MOTION FOR CLARIFYING THE RECORD.

Comes now appellant above named, and for the purpose of clarifying the record in the above entitled cause, makes motion as follows:

1. For order of the above entitled court recalling the mandate heretofore issued in the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division.

2. Upon the return of said mandate, for entry of final decree in conformity with the opinion of this court, filed September 8, 1932, dismissing appellant's libel in rem, in so far as such libel claims and asserts a maritime lien against the steamship "Pacific Cedar."

3. Also upon the return of said mandate, for order of the above entitled court in personam, remanding to said District Court said cause in so far as said libel claims and asserts a cause of action against the appellee as respondent in personam, for the purpose of trial on issues of fact to be joined upon proposed answer of respondent Dimon Steamship Corporation or the receivers thereof.

This motion is based upon the record in the above entitled cause, and upon authorizing stipulation hereunto attached and by this reference made a part hereof.

FARNHAM GRIFFITHS,
LANE SUMMERS,
McCUTCHEN, OLNEY, MANNON & GREENE,
HAYDEN, MERRITT, SUMMERS & BUCEY,

Proctors for Appellant.

[Endorsed:] Filed Jan. 9, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

STIPULATION FOR CLARIFYING THE RECORD.

WHEREAS the libel in this cause claimed and asserted a cause of action against the respondent steamship "Pacific Cedar" in rem, and also against the respondent Dimon Steamship Corporation in personam;

WHEREAS, upon exceptions to said libel, the same was dismissed by the District Court as to both the cause of action in rem and the cause of action in personam;

WHEREAS, pursuant to its opinion filed September 8, 1932, this court affirmed the District Court by dismissing said libel in rem, and reversed the District Court by recognizing admiralty jurisdiction in personam and granting judgment against the respondent Dimon Steamship Corporation in personam for the amount claimed;

WHEREAS appellee subsequently filed a petition for modification of the opinion and decree of this court in so far as it granted judgment in personam, in consideration of which petition this court entered an order on November 7, 1932, whereby its decree of September 8, 1932, was vacated and set aside.

WHEREAS, since the filing by ancillary receivers for the appellee of petition to file an answer

to said libel, an order was entered by this court on December 22, 1932, remanding this cause to the District Court for trial upon issues to be raised by the proposed answer of such ancillary receivers;

Whereas, there has thus arisen ambiguity in the record as to the status and finality of the decree of this court entered on September 8, 1932, in so far as the same dismissed the libel in rem;

NOW, THEREFORE, for the purpose of clarifying the record herein concerning the disposition by this court of the maritime lien asserted by appellant through said libel, by and between appellant above named, appellee above named, and said ancillary receivers, it is hereby stipulated:

1. That upon motion filed by appellant, without notice, and upon the authority hereof, this court may enter an order recalling its mandate heretofore issued to the District Court, and thereafter may enter its final order in this cause, dismissing said libel in rem against the respondent steamship "Pacific Cedar," and remanding this cause in personam to the District Court for trial upon issues of fact raised by the proposed answer of said ancillary receivers.

2. That the purpose of this stipulation being purely for clarity and certainty in the record, it shall not be deemed to prejudice the substantive rights of any party hereto.

Dated this 6th day of January, 1933.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

LAWRENCE BOGLE,
CASSIUS E. GATES,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER and
J. RAYMOND TIFFANY,
Ancillary Receivers Dimon Steamship Corp.

[Endorsed]: Filed January 9, 1933. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the tenth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER RECALLING MANDATE.

Upon consideration of the motion of proctors for the appellant for the recall of the mandate of this court in above cause heretofore issued on December 22, 1932, and good cause therefor appearing, IT IS ORDERED that the said mandate issued to the District Court of the United States for the Western District of Washington, Northern Division, remanding this cause to that court with directions to try the issues raised by the answer of the Ancillary Receivers herein be, and hereby is recalled.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the tenth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING ENTRY OF DECREE, ETC.

Upon motion of proctors for appellant, orally presented by Mr. Farnham P. Griffiths, proctor for appellant, and good cause therefor appearing, IT IS ORDERED that a decree be filed and entered in this cause as of this date, in accordance with the opinion of this court rendered on September 8, 1932, and providing for the remanding of this cause in personam to the District Court to try the issues of fact raised by the answer of the Ancillary Receivers.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 6660

KRAUSS BROS. LUMBER COMPANY, a Corporation,

Appellant,

vs.

DIMON STEAMSHIP CORPORATION, Claimant, etc.,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and on the motion of the appellant for entry of final decree in conformity with the opinion of this court rendered on September 8, 1932, and providing for remanding of this cause in personam to the District Court to try the issues of fact raised by the answer of the Ancillary Receivers, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court dismissing the libel in rem in this cause be, and hereby is affirmed, and the decree of the said District Court dismissing the libel in personam be, and hereby is reversed, with costs in favor of the appellant and against the appellee, and that this cause in personam be, and hereby is remanded to the said District Court with directions to try the issues of fact raised by the answer of the Ancillary Receivers John Ambler and J. Raymond Tiffany.

It is further ordered, adjudged and decreed by this court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered January 10, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR CERTIFIED TRANSCRIPT.

To Paul O'Brien, Clerk of the above entitled court:

Supplementing previous praecipe for certified transcript, you are requested to be kind enough to prepare and certify transcript of record in the above entitled cause, in conformity with the rules and practice of the Supreme Court of the United States relative to application for and review upon writ of certiorari, such transcript to include the following:

1. The entire printed transcript of record upon which the case was heard in the above entitled court;

2. Order of submission;

3. Order directing filing of opinion;

4. Opinion filed September 8, 1932;

5. Decree entered September 8, 1932;

6. Any order actually entered staying mandate;

7. Any application for stay of mandate which has been granted by order;

8. Bond for stay of mandate;

9. Opinion filed November 7, 1932;

10. Order of November 7, 1932, directing filing of opinion and vacating decree of September 8, 1932;

11. Order of November 7, 1932, granting leave to apply for leave to file answer, and vacating decree of September 8, 1932;

12. Order of December 22, 1932, granting leave to file answer, and remanding cause for trial;

13. Appellant's motion of January 7, 1933, to clarify the record, and supporting stipulation;

14. Order of January 10, 1933, recalling mandate;

15. Decree of January 10, 1933, affirming decree of District Court dismissing libel in rem, and reversing decree of District Court dismissing libel in personam and remanding cause in personam for trial;

16. This praecipe;

17. All other proceedings, if any, customarily included in such transcript;

18. Clerk's usual certificate.

Dated at Seattle, Washington, this 20th day of January, 1933.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

Due service of the foregoing praecipe is acknowledged, and receipt of copy is hereby admitted this 20th day of January, 1933.

The foregoing praecipe is hereby approved.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER,
J. RAYMOND TIFFANY,
Ancillary Receivers Dimon Steamship Corporation,
By B. McC. G.
As Ancillary Receivers of Dimon Steamship Corporation.

[Endorsed]: Filed January 23, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

APPLICATION FOR STAY OF MANDATE.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now appellant above named, and hereby makes application for order staying the mandate of the above entitled court upon its decree filed January 10, 1933, and staying execution and enforcement of said decree for a reasonable time, to-wit, until the expiration of three months next following the date of said decree, for the purpose of enabling appellant to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and thereafter until final ruling by said Supreme Court of the United States.

This application is based upon the record in the above entitled cause, and upon stay bond hereto attached, and by this reference made a part hereof.

Dated this 28th day of January, 1933, at Seattle, Washington.

LANE SUMMERS,
HAYDEN, MERRITT, SUMMERS & BUCEY,
Proctors for Appellant.

United States of America,
State of Washington,
County of King.—ss.

Lane Summers, being first duly sworn, upon oath deposes and says:

That he is an attorney at law, and a member of the firm of Hayden, Merritt, Summers & Bucey; that as such he is one of the proctors of record for appellant above named; that stay of mandate and execution is not sought merely for purposes of delay; that he verily believes jurisdictional grounds and meritorious reasons exist, entitling appellant to a review by the Supreme Court of the United States of the above entitled cause; and that the foregoing application for stay, and the contemplated application for a writ of certiorari, are well founded in law; that appellant has filed praecipe for transcript of record and directed the printing thereof and has prepared its petition for writ of certiorari and brief in support thereof, excepting only page references to the record.

LANE SUMMERS.

Subscribed and sworn to before me this 28th day of January, 1933.

[Seal] W. H. HAYDEN,
Notary Public in and for the State of Washington, residing at Seattle.

Service of the foregoing application and accompanying bond is hereby acknowledged, and receipt of copy thereof admitted on this 30th day of January, 1933.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.
JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING MANDATE.

Upon appellant's verified application for stay of mandate in the above entitled cause, and stay of execution and enforcement of decree of this court in said cause, for the purpose of enabling appellant to petition for and obtain a writ of certiorari from the Supreme Court of the United States, it appearing to the court that such application has been presented timely and has been accompanied by security proper as to form and adequate as to amount,

NOW, THEREFORE, it is hereby ORDERED:

1. That such security be and the same hereby is approved as to form, amount and surety;

2. That said application of appellant be and the same hereby is granted, appellant being allowed to and including February 28, 1933, within which to make and file its petition and other requisite papers for writ of certiorari by the Supreme Court of the United States;

3. That in the event appellant shall so make and file its petition within said time, then such mandate, together with the execution and enforcement of judgment thereon, shall be stayed, pending the final determination of the above entitled cause by the Supreme Court of the United States.

Done this 1st day of February, 1933.

CURTIS D. WILBUR,
U. S. Circuit Judge.

Service of the foregoing order staying mandate, by receipt of copy thereof, is admitted this 30 day of January, 1933.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.
JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

BOND UPON STAY OF MANDATE.

KNOW ALL PERSONS BY THESE PRESENTS: That we, appellant KRAUSS BROS. LUMBER COMPANY, a corporation, as Principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, as Surety, are hereby held and firmly bound unto DIMON STEAMSHIP CORPORATION, a corporation, its successors and assigns, in the full sum of one thousand dollars ($1000.00), to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our successors and assigns firmly by these presents.

Signed, sealed and delivered at Seattle, Washington, this 28th day of January, 1933.

The condition of the foregoing obligation is such that,

WHEREAS, said appellant feels aggrieved by, and considers error was committed in that certain decree of the United States Circuit Court of Appeals for the Ninth Circuit, filed January 10, 1933, in the above entitled cause, wherein and whereby said court denied the existence of a maritime lien, and ordered dismissed the libel of said appellant in so far as the same attempted to assert a maritime lien and to obtain the benefits thereof, affirming the decree of the United States District Court for the Western District of Washington, Northern Division, in its dismissal of appellant's libel in rem; and

WHEREAS, said appellant, contemporaneously with the execution and presentation of this bond, is applying to said Circuit Court of Appeals for an order staying its mandate and staying execution and enforcement of its decree;

NOW, THEREFORE, if said appellant shall make and file its application or petition for writ of certiorari within the period of time allowed therefor, and shall obtain said writ of certiorari from the Supreme Court of the United States, and shall make good its plea and maintain its contentions in said Supreme Court of the United States, or, in default thereof, shall answer for and pay to Dimon Steamship Corporation, a corporation, John Ambler and J. Raymond Tiffany, as ancillary receivers thereof, and/or the successors thereof, all damages and costs resulting from such failure, or by reason of said stay of the mandate of said Circuit Court of Appeals; then this obligation shall be null and void; otherwise the same shall continue in full force and effect.

Principal

[Seal] KRAUSS BROS. LUMBER COMPANY,
a corporation,
By A. J. KRAUSS,
President.

Attest:

LANE SUMMERS,

Secretary.

Surety

[Seal] AMERICAN SURETY COMPANY OF NEW YORK,

By S. H. MELROSE,

Res. Vice President.

Attest:

B. L. JOLLY,

Res. Asst. Secretary.

Approved as to form, amount and surety, this 1st day of February, 1933.

CURTIS D. WILBUR,

U. S. Circuit Judge.

It is hereby STIPULATED that the foregoing bond may be filed by appellant, in cancellation of, and in substitution for previous "Bond Upon Stay of Mandate," dated October 4, 1932.

LAWRENCE BOGLE,
CLAUDE E. WAKEFIELD,
BOGLE, BOGLE & GATES,
Proctors for Appellee.

JOHN AMBLER &
J. RAYMOND TIFFANY,
Ancillary Receivers.

United States of America,
State of Washington,
County of King.—ss.

This is to certify that on this 30th day of January, 1933, before me personally appeared A. J. Krauss and Lane Summers, to me known to be the President and Secretary, respectively, of Krauss Bros. Lumber Company, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] FRED S. MERRITT,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
State of Washington,
County of King.—ss.

This is to certify that on this 28 day of January, 1933, before me personally appeared S. H. Melrose and B. L. Jolly, to me known to be the Resident Vice President and Resident Assistant Secretary, respectively, of American Surety Company of New York, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate first above written.

[Seal] A. E. KRULL,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed February 1, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-seven (97) pages, numbered from and including 1 to and including 97, to be a full, true and correct copy of the record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to praecipe of proctors for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the original thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of February, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3291)

MAIN 2279
94 SPRING ST.
SEATTLE, WASH.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO.....

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

PETITION

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND

BRIEF IN SUPPORT THEREOF

LANE SUMMERS,
Central Building,
Seattle, Washington,
Proctor for Petitioner.

W. H. HAYDEN,
F. T. MERRITT,
G. H. BUCEY,
Central Building,
Seattle, Washington,
Of Counsel.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable CHARLES E. HUGHES, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

PRAYER

The petitioner, Krauss Bros. Lumber Company, a corporation, prays that a writ of certiorari issue to review the decree entered January 10, 1933, by the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause (R. 85).

DECREE BELOW

Such decree of the United States Circuit Court of Appeals for the Ninth Circuit dismissed petitioner's libel in admiralty to the extent that a maritime lien was asserted against the steamship "Pacific Cedar" (R. 86).

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of excess freight money—being the difference between

the tentative maximum rate actually paid ($10.00 per M ft.) and the applicable minimum rate rightly retainable ($8.50 per M ft.) under affreightment contract stipulating:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9, 26, 72, 73, 74, 82, 86.)

SUMMARY OF FACTS

In November, 1929, petitioner Krauss Bros. Lumber Company, as shipper, and respondent Dimon Steamship Corporation, as carrier, signed an affreightment contract, whereby certain lumber cargo was to be loaded in January, 1930, on the Pacific Coast at the ports of Puget Sound and Grays Harbor aboard the steamship "Pacific Cedar," to be transported to the Atlantic Coast, and to be discharged at the ports of Philadelphia and New York, all in consideration of freight, the rate and amount thereof to be determined by the following clauses:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9.)

Pursuant to such engagement, said steamship "Pacific Cedar" loaded said cargo at agreed Pacific Coast

ports in January, 1930, and, after transportation in due course, discharged the same at agreed Atlantic Coast ports in March, 1930. During such discharge respondent, in behalf of said steamship "Pacific Cedar," demanded and collected from petitioner the freight on said lumber cargo at the rate of $10 per M feet. (R. 5, 6.)

During the month of January, 1930, the Luckenbach Steamship Company, a "regular intercoastal carrier," moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to-wit: $8.50 per M feet. (R. 6.)

Later, petitioner demanded from respondent return of freight in the amount of the difference between the $10 rate paid and the $8.50 rate applicable. Such demand was refused. (R. 6.)

Upon May 18, 1931, petitioner's libel in *personam* against respondent, and in *rem* against said steamship "Pacific Cedar," was filed in admiralty, alleging for a cause of action the facts above summarized, seeking repayment of such excess freight, and asserting a maritime lien therefor (R. 8, 12). Said steamship, upon due process in *rem*, was forthwith attached and, by respondent on bond, was promptly released (R. 12, 16, 21).

On June 18, 1931, respondent filed exceptions to said libel upon two grounds: (1) that no maritime lien existed (R. 26); (2) that the cause of action alleged was non-maritime in nature, and not within the admiralty jurisdiction (R. 25).

RULINGS OF LOWER COURTS

IN REM;

The District Court, considering the exception attacking the maritime lien, in this case and in several sister cases, upon hearing (R. 26), and rehearing (R. 32), concluded: that the pledge of service and compensation between ship and cargo being reciprocal, the rights to a maritime lien must be reciprocal (R. 29, 35); that the lien of the shipowner against cargo having been lost by delivery of cargo, the lien of the cargo owner against the ship could not exist thereafter (R. 30, 36); that a maritime lien can arise only from some contract or occurrence, relating to the service of the ship, which must be visible, manifest and physical, serving as notice to the world of the claim (R. 30, 36); and hence that no maritime lien was present (R. 30, 38). The District Court sustained said exception (R. 39); and dismissed said libel in *rem* by decree entered September 14, 1931 (R. 40). Petitioner duly noted exception (R. 41).

The Circuit Court of Appeals, concurring, concluded that to enforce a lien against the ship, where neither owner or master of the ship on the one hand, nor owner of cargo on the other, knew the facts upon which the lien was predicated until after right delivery of the cargo, and where no visible fact or occurrence gave notice of the lien to the public, would extend the maritime lien beyond reason and beyond authoritative decision (R. 72, 73, 74). The Circuit Court of Appeals held that, under the circumstances of this case, no maritime lien existed, and by its decree entered January 10, 1933, dismissed said libel in *rem* (R. 86).

IN PERSONAM:

Being extraneous to the maritime lien question presented, the rulings of the lower courts in *personam* upon the exception attacking the maritime nature of the cause of action and the admiralty jurisdiction are condensed to the merest recital:

(a) The District Court, concluding that the cause of action was non-maritime and that admiralty had no jurisdiction (R. 28, 31, 34, 39), dismissed said libel in *personam* by decree entered September 14, 1931 (R. 41);

(b) The Circuit Court of Appeals, concluding the contrary (R. 65-72) after several intermediate orders

(R. 75, 78, 79), reversed the District Court, and by its decree entered January 10, 1933, remanded the cause in *personam* for trial upon issues raised by the answer of the Ancillary Receivers of the respondent (R. 86).

REASONS FOR GRANTING WRIT

I. Conflict of Decisions Between Circuit Courts of Appeals

The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case entitled *The "Oregon," et al., v. Pittsburgh & Lake Angeline Iron Co.* (*The "Oregon"*), 55 Fed. 666, wherein the opinion was written in 1893 by Chief Justice Taft, then a circuit judge.

The report of the earlier decision, respecting material facts, discloses: That the vessel "Palms" was chartered at a flat rate of freight, and by the charterer was sublet to a shipper at a higher rate; that on discharge of cargo the shipper paid to the master the full higher rate; and that the charterer, to collect the difference between the higher rate received and the flat rate retainable by the shipowner, asserted a maritime lien by libel in *rem* against the vessel.

The report of the earlier decision, respecting the ruling, discloses: That while the opinion of Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed and was enforced without comment. However, the existence of a maritime lien was a legal essential to the decree of the court entered against the vessel.

II. Question Justifies Settlement by this Court

On shipments by foreign carriers or tramp vessels lacking local representation supporting process service in *personam*, in transactions with domestic shipowners having inadequate capital or utilizing single hull corporations, under affreightments by major lines in times of financial depression, in dealings with general ships covered by various charters and subcharters befogging personal responsibility, and also in recoveries following precipitous embargoes upon goods and sudden commandeering of tonnage—a maritime lien for freight returnable is conducive to promptitude of adjustment, frequent in application, and vital to security of payment. All merchants moving cargo, and all companies operating ships, are concerned in the existence and the extent of such a lien.

Hence the Circuit Court of Appeals, by denying the maritime lien in this litigation (R. 74, 86) has decided an important question of federal law. It has not been, but should be, definitely settled by this court.

In three cases this court has rendered decisions on the merits of suits instituted in *rem* against the vessel, based upon claims for the return of freight in whole or in part. In each instance the existence of the maritime lien was assumed without discussion.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

III. Conflict with Applicable Decisions of this Court

The Circuit Court of Appeals, by denying the maritime lien against the vessel for freight unearned, has decided a federal question in this case (R. 74, 86) in probable conflict with applicable decisions of this court.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

These decisions by this court have not been accepted as unequivocal, but nevertheless they are applicable.

IV. Conflict with Weight of Authority

The existence of a maritime lien against a vessel to recover freight money in excess of the amount agreed or earned is a question of general maritime law, important to all directly engaged in commerce by water.

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case, denying such a lien, is against the great weight of authority, whether measured by the number of decisions, the ranking of the courts, or the reasoning of the opinions.

The decisions cited are analyzed in the accompanying brief.

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 Fed. (2d) 401 (1929, C. C. A. 9);

The Capitaine Faure, 10 Fed. (2d) 950 (1926, C. C. A. 2);

The Esrom, 272 Fed. 266 (1921, C. C. A. 2);

The Oregon, et al., v. Pittsburgh & Lake Angeline Iron Co., 55 Fed. 666, 668, 669, 676, 677 (1893, C. C. A. 6);

The Sudbury, 33 Fed. (2d) 293 (1929, Cal. D. C.);

The Emilia S. De Perez, 22 Fed. (2d) 585 (1927, Md. D. C.);

The Fredensbro, 18 Fed. (2d) 983 (1927, Pa. D. C.);

The Henry W. Breyer, 17 Fed. (2d) 423 (1927, Md. D. C.);

The Muskegon, 10 Fed. (2d) 817, (1927-N. Y. D. C.)

The G. A. Tomlinson, 279 Fed. 786 (1922-N. Y. D. C.)

The Ada, 233 Fed. 325 (1916-Md. D. C.)

The Oceano, 148 Fed. 131 (1906-N. Y. D. C.)

The Port Adelaide, 59 Fed. 179 (1893-N. Y. D. C.)

The Wyoming, 36 Fed. 493 (1888-Mo. D. C.)

The St. Joseph, Fed. Cas. 12230 (1878-Mich. D. C.)

The Emma, Fed. Cas. 18218 (1876-Miss. D. C.)

The A. M. Bliss, Fed. Cas. 274 (1872-Mass. D. C.)

The Hardy, Fed. Cas. 6056 (1870-Minn. C. C.)

The St. Joseph, Fed. Cas. 3908 (1855-Ill. C. C.)

Church v. Shelton, Fed. Cas. 2714, (1855-Mass. C. C.)

The Panama, Fed. Cas. 10703 (1846-N. Y. D. C.)

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

LANE SUMMERS,
Central Building,
Seattle, Washington,
Proctor for Petitioner.

W. H. HAYDEN,
F. T. MERRITT,
G. H. BUCEY,
Central Building,
Seattle, Washington,
Of Counsel.

UNITED STATES OF AMERICA
STATE OF WASHINGTON, } ss
COUNTY OF KING.

LANE SUMMERS, being first duly sworn, on oath deposes and says:

That he is an attorney at law, admitted to practice before the Supreme Court of the United States; that he is one of the proctors for petitioner in the above entitled cause; that he prepared the foregoing petition in good faith and not for delay; that said petition in his opinion is meritorious and well founded in law; that he has read said petition, knows the contents thereof, and believes the same to be true.

LANE SUMMERS.

Subscribed and sworn to before me this 20th day of February, 1933.

SEAL

G. H. BUCEY,
Notary Public in and for the State of Washington, residing at the City of Seattle.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

NO.....

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Two opinions were delivered by the District Court. Both were written by District Judge Jeremiah Neterer, being filed upon July 14, 1931, and August 4, 1931. The opinion on the original hearing (R. 26) was not reported; the opinion on rehearing (R. 32) was reported in 53 Fed. (2d) 492-495.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilbur and Sawtelle, with District Judge

Norcross—written by Circuit Judge Wilbur) was filed September 8, 1932, (R. 64) and was reported in 61 Fed. (2) 187.

Extraneous to the question presented, and pertinent only to questions in *personam*, said Circuit Court of Appeals, upon respondent's petition for modification, filed opinion November 7, 1932 (R. 76); such opinion has not yet been reported.

JURISDICTION

Jurisdiction of this court is invoked under Judicial Code section 240(a) as amended by act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A. section 347).

The decree of the Circuit Court of Appeals to be reviewed was entered January 10, 1933 (R. 86).

Petition for writ of certiorari was filed February ——, 1933.

No petition for rehearing has been filed relative to such final decree.

Explanatory of the lapse of time between rendition of the opinion of the Circuit Court of Appeals and its final decree, there was interposed by respondent petition seeking modification solely of that portion of the opinion and decree of the Circuit Court of Ap-

peals filed and entered September 8, 1932, which awarded judgment against respondent in *personam* (R.74); such petition was granted and said decree entirely vacated by orders filed upon November 7, 1932, (R. 75, 77, 78) and also upon December 22, 1932, (R. 78, 79). Thereafter the original decision in *rem* upon the maritime lien question here presented was reinstated by final decree entered January 10, 1933, (R. 86).

FACTS

The recital of material facts in the petition may be emphasized by summary repetition. Petitioner, as shipper, and respondent, as carrier, signed an affreightment contract for loading, carriage and discharge of lumber cargo, in consideration of freight, the rate and amount thereof to be determined by provision as follows:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9).

During discharge respondent, as carrier, demanded and collected from petitioner freight at the rate of $10.00 per M feet (R. 6).

Contemporaneously, on a parallel voyage, the Luckenbach Steamship Company, a "regular intercostal

carrier," moved similar cargo at a lower rate, to-wit: $8.50 per M feet (R. 6).

Later petitioner demanded from respondent return of the freight in the amount of the difference between the $10.00 rate paid and the $8.50 rate applicable (R. 6). Such demand was refused (R. 6, 7).

Subsequently petitioner's libel was filed (R. 3, 12) in *personam* against the respondent, and in *rem* against the steamship "Pacific Cedar," which, on due process, was attached (R. 12, 14).

To said libel respondent filed exceptions: in *personam*, upon the ground that the cause of action alleged was non-maritime and outside of admiralty jurisdiction; in *rem*, upon the ground that no maritime lien existed (R. 25, 26.) The District Court sustained both exceptions (R. 41.) The Circuit Court of Appeals reversed the District Court as to the exception in *personam*, and affirmed the District Court as to the exception in *rem* (R. 86).

No petition for rehearing in the Circuit Court of Appeals was filed as to its final decree entered January 10, 1933.

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of ex-

cess freight money—being the difference between the tentative maximum rate actually paid ($10.00 per M ft.) and the applicable minimum rate rightly retainable ($8.50 per M ft.) under affreightment contract stipulating:

> "Rate of freight $10 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9, 26, 72, 73, 74, 82, 86).

ARGUMENT

I. Conflict of Decision Between Circuit Courts of Appeals

As asserted by the petition, the decision of the Circuit Court of Appeals in the present case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case entitled *The "Oregon," et al. v. Pittsburgh & Lake Angeline Iron Co.* (*The "Oregon"*), 55 Fed. 666, wherein the opinion was written in 1893 by Chief Justice Taft.

The report of the earlier decision as to material facts discloses: That the vessel "Palms" was chartered at a flat rate of freight, and by the charterer was sublet to a shipper at a higher rate; that on discharge of cargo the shipper paid to the master the full higher rate; and that the charterer, to collect the difference between the higher rate received and

the flat rate retainable by the shipowner, asserted a maritime lien by libel in *rem* against the vessel.

The report of the earlier decision as to the ruling discloses: That while the opinion of Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed and was enforced without comment. However, the existence of a maritime lien was a legal essential to the decree of the court entered against the vessel.

Substantiation of the foregoing epitome appears from the following extracts:

> "The libels were filed in the district court * * * *against the propeller Oregon and the schooner Palms*, * * *." (55 Fed. 668).
>
> "*In the libel against the Palms*, in addition to the foregoing averments, it was charged that the captain of the Palms had collected from the consignee of the iron ore carried upon one of the trips, to whom the libelant had sold the tonnage for that trip, $104 more than the charter rate, which belonged to libelant as profit upon the sale of the tonnage, and which the captain turned over to respondents." (55 Fed. 669).
>
> "The master in the district court found that *the two vessels had violated their contracts*, * * *. *He also found for libelant against the Palms for $104*. The district court confirmed the findings, and entered the proper decree, which was affirmed by the circuit court. The difference between the contract and going rates of freight when libelant bought tonnage to carry the car-

goes for the lost trip was 80 cents a ton, making $840 damages chargeable to each vessel, as well as the $104 additional *against the Palms.* (55 Fed. 669.)

"There remains to consider only the $104 *charged against the Palms.* This was the profit of 10 cents a ton on one trip of that vessel where the libelant sold the tonnage to Harvey Brown at $1.80 per ton. * * * The captain of the Palms collected the entire freight from Brown, and turned it over to Gilchrist, managing owner of the Palms. The 10 cents a ton, or $104, of the freight belongs to the libelant, and *the Palms or her owners* should pay the same to the libelant. But the jurisdiction of this court in admiralty to render a decree for the money is denied on the ground that the cause of action is not maritime, but is a mere right to sue for money had and received at common law. *As the collection of the $104 was incidental to the execution of the maritime contract sued on, and may be regarded as an overcharge of freight* by appellants against appellee under that contract, we think the amount fairly recoverable as damages for its breach, and therefore fully within the admiralty jurisdiction. The decrees of the circuit court in both cases are affirmed." (55 Fed. 676, 677).

The former decision in the Sixth Circuit Court involved charterer's claim, based on an implied obligation, to collect from the shipowner freight in excess of the amount rightly retainable after payment by the subcharterer. The present decision in the Ninth Circuit Court involves shipper's claim, based on express agreement, to recover from the shipowner

freight in excess of the amount rightly retainable after payment by the shipper. In both decisions a maritime lien was asserted. By the Sixth Circuit Court the lien was enforced; but by the Ninth Circuit Court the lien was denied.

In the older case the original charter did not contemplate the possible payment by any subcharterer, and hence the obligation of the shipowner to repay to the charterer excess freight or hire arose merely by implication of law, and not from any provision of the charter party. In the present case the affreightment contract did contemplate the possible payment of excess freight by the petitioner as shipper, and hence respondent's obligation as carrier to repay the excess portion arose by express agreement. An examination of the differences of fact involved in the two decisions demonstrates no resultant difference in applicable principles. Therefore the decisions are in conflict.

II. Question Justifies Settlement by this Court

For the sake of uniformity, the Constitution extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction. The peculiar distinguishing feature of this jurisprudence is the maritime lien. Hence the determination of the

character and extent of the maritime lien is a matter of importance, justifying the consideration of this court.

Heretofore in three cases this court has rendered decisions on the merits of admiralty suits in *rem* against the vessel, based upon claims for the return of freight in whole or in part. In all of these cases the existence of the maritime lien was assumed without comment.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629, (1870).

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, (1919).

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318, (1919).

In the first of the cases cited, the cargo owner being granted a recovery against the vessel for the prepaid portion of freight, the existence of the maritime lien was essential to this court's decision. In the two later cases, the consideration by this court of the merits of the controversies was unnecessary, and all expressions of opinion were *dicta*, if the maritime lien was non-existent.

This court has repeatedly ruled that, in the absence of jurisdictional foundation, a decision on the merits will not be rendered.

Mansfield, etc. Co. v. Swan, 111 U. S. 379, 384, 28 L. Ed. 462, 464, (1884).

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 873, (1904).

Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521 (1910).

U. S. v. Mayer, 235 U. S. 55, 70; 59 L. Ed. 129, 136, (1914).

In the light of such rule, all of the cases decided by this court involving a maritime lien against a vessel for freight should be considered as recognition of the lien. Nevertheless, the two later cases especially have not been accepted as determinative. Reflecting uncertainty is the negative ruling of the Circuit Court of Appeals in the present case and previous judicial comment, as follows:

> "The libelant urges the Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318; and Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 146, 63 L. Ed. 312, 3 A. L. R. 15. No point of jurisdiction was raised in those cases in any court, as both sides were extremely anxious to have the question authoritatively settled because the embargo had raised many such cases involving in the aggregate a very large sum of money. The courts would not have been eager to take the point sua sponte, as they sometimes do."

Israel et al. v. Moore & MacCormack Co., 295 Fed. 919, 920 (D. C. N. Y.).

This state of the law upon a question of importance should prompt this court to accept the burden of absolute settlement.

III. Conflict with Applicable Decisions of this Court

The denial, in this case, by the Circuit Court of Appeals of a maritime lien against the vessel for freight rightfully returnable, is a decision of a federal question in probable conflict with the three decisions of this court just discussed:

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870).

Allanwilde Transportation Corp. v. Vacuum Oil Co., 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312, (1919).

International Paper Co. v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318, (1919).

Respecting these cases, as already observed, they have not been accepted as unqualified recognition by this court of a maritime lien upon a vessel for freight.

Nevertheless, in principle the cases are applicable; and the decision of the Circuit Court of Appeals conflicts therewith. It also violates the essence of a maritime lien arising from an affreightment contract, as declared by this court:

> "The right of a shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law. It has been asserted in a variety of forms in the Consulado, the most ancient and important of all of the old codes of sea laws (see Chaps. 63, 106, 227, 254, 269), and the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law."
>
> *Dupont, DeNemours & Co. v. Vance*, 60 U. S. (19 How.) 162, 168, 169; 15 L. Ed. 584, 586.

Furthermore, the denial of the maritime lien by the Circuit Court of Appeals in the present case is a misapplication of two decisions by this court, cited as authority in its opinion (R. 72, 73.) *Vanderwater v. Mills*, 60 U. S. (19 How.) 82, 90, 15 L. Ed. 554, 556. *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, 499, 67 L. Ed. 364, 367.

In *Vanderwater v. Mills, supra*, the owners of the vessel "Yankee Blade" and the owners of the vessel "America" contracted as between themselves to employ the "Yankee Blade" on a voyage from New York to Panama, and to employ the "America" on a continuation thereof from Panama to San Francisco for through carriage of cargo and passengers. The "Yankee Blade" refused performance. The owners of the

"America" sued in *rem*. This court rightfully denied the maritime lien asserted, saying:

> "This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common law."

Vanderwater v. Mills, 60 U. S. (19 How.) 82, 92, 15 L. Ed. 554, 557.

In *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*, upon the refusal of the master to load all the cargo required by the charter party, a libel in *rem* was filed against the ship by the charterer for damages resulting from such refusal. Again this court denied the maritime lien because there had been no union between the cargo and the ship, saying:

> "The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vanderwater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not

attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the shipowner upon the cargo."

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 499, 500; 67 L. Ed. 364, 367.

Neither of the decisions of this court under discussion is applicable on the facts involved. In the first case there was in existence no contract between the shipowner and a cargo owner, the contract being between the owners of two ships creating a partnership arrangement. In the second case under the charter party there was no union of the ship with the particular cargo for which lien was asserted. On the contrary, in the present case there was an affreightment contract, and all of the cargo was loaded.

In the light of the differences of fact, there is no language in either opinion which should be considered as logical basis for the denial of the lien by the Circuit Court of Appeals in the present case. In fact, the declarations of law relative to a maritime lien made by this court in these decisions, and quoted by the Circuit Court of Appeals in its opinion in the present case, could appropriately be repeated by petitioner in support of its claim of a maritime lien.

In the present case the maritime lien asserted is one of the reciprocal rights existent between shipowner and cargo owner. The shipowner was entitled to a maritime lien upon the cargo for the payment of freight less than the agreed amount. Reciprocally, the cargo owner is entitled to a maritime lien for the repayment of freight in excess of the agreed amount.

IV. Conflict with Weight of Authority

The existence of a maritime lien against a vessel to recover freight money in excess of the amount agreed or earned is a question of general maritime law, important in point of legal theory and in point of practical utility in the shipping world.

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case, denying such a lien, is against the great weight of authority upon the subject in the federal courts.

The decisions listed reflect the recognition and adoption of such a lien for repayment of freight money as a part of the general maritime law.

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 Fed. (2d) 401 (1929, C. C. A. 9), involved a libel in *rem* by the cargo owner to recover emergency expenses at a port of call (analagous to

freight) wrongfully exacted by the master. The opinion said:

> "The undertaking of a ship to deliver goods as evidenced by the bill of lading is, of course, absolute, except so far as it may be relieved either because the venture was frustrated or by the terms of the bill of lading."
>
> *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, 402.

The facts in *The Capitaine Faure*, 10 Fed. (2d) 950 (1926, C. C. A. 2), are dissimilar; however, the opinion stated:

> "But an action in *rem* lies for the breach of a contract of affreightment, where the goods have been actually delivered and received on board. That such is the established law is not controverted, or in any way questioned in this suit."
>
> *The Capitaine Faure*, 10 Fed. (2d) 950, 961.

The Esrom, 272 Fed. 266 (1921, C. C. A. 2), recognized the lien by the approval given to the ruling in *The Ada*, 233 Fed. 325 (1916, Md. D. C.), resulting from a libel in *rem* for excess freight. The opinion observed:

> "So, too, the ship is then bound and cannot collect further freight at destination."
>
> *The Esrom*, 272 Fed. 266, 271.

The decision in *The Oregon, et al., v. Pittsburgh & Lake Angeline Iron Co.*, 55 Fed. 666, 668, 669, 676,

677 (1898, C. C. A. 6), enforcing a maritime lien for an overcharge of freight, has been discussed heretofore.

In *The Sudbury*, 33 Fed. (2d) 293 (1929, Cal. D. C.), the vessel was conceded to be subject to a lien for general average contribution — essentially similar to freight — as a necessary emergency expense for completion of the voyage. The opinion said:

> "The libel pleads the sums which the 'Sudbury' and cargo should pay and does not set forth the shares due from the Sudbury, which alone is libeled, and which is liable for its shares only."
>
> *The Sudbury*, 33 Fed. (2d) 293.

In *The Emilia S. De Perez*, 22 Fed. (2d) 585 (1927, Md. D. C.), lien against the vessel was enforced for general average, the opinion saying:

> "It therefore follows, from the very nature of general average, and from the principle that 'the vessel is bound to the cargo and the cargo bound to the vessel,' that the vessel must be liable in rem for its portion of the general average loss. The Allianca (D. C.) 64 F. 871, affirmed (C. C. A.) 79 F. 989; Du Pont de Nemours v. Vance, 19 How. 162, 168, 15 L. Ed. 584."
>
> *The Emilia S. De Perez*, 22 Fed. (2d) 585, 586.

The decision in *The Fredensbro*, 18 Fed. (2d) 983, (1927, Pa. D. C.), enforced a maritime lien for the return of prepaid freight.

In the case of *The Henry W. Breyer*, 17 Fed. (2d) 423, (1927, Md. D. C.), shippers successfully asserted a maritime lien to recover prepaid freight.

The court in deciding *The Muskegon*, 10 Fed. (2d) 817, (1927, N. Y. D. C.), granted recovery of duplicate freight by means of a maritime lien against the vessel.

Return of freight money was obtained in *The G. A. Tomlinson*, 279 Fed. 786 (1922, N. Y. D. C.), by resort to a maritime lien.

The decision in *The Ada*, 233 Fed. 325 (1916, Md. D. C.), enforced a maritime lien for excess freight collected by the steamer.

In the opinion of the court in *The Oceano*, 148 Fed. 131 (1906, N. Y. D. C.), which involved closely parallel facts, the existence of a maritime lien for recovery of freight in excess of the amount earned is discussed and recognized, the opinion saying:

> "It follows from the view taken of the subject-matter of this action that the cause may be brought in rem. * * * As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained

for any liability of the master or owner arising therefrom."

The Oceano, 148 Fed. 131, 132, 133.

The opinion in the case of *The Port Adelaide*, 59 Fed. 179 (1893, N. Y. D. C.), by Judge Benedict, discloses the enforcement in favor of the charterer of a lien for freight money improperly collected by the shipowner from shippers permitted to load cargo on a voyage when the whole reach of the ship had been reserved by the charterer. The opinion said:

> "It is said that if the freight collected at Kioto, and paid over to the shipowners, belongs to the charterer, the libelant's claim is against the shipowners for money had and received, and is not within the jurisdiction of the admiralty. But the service performed in earning the freight was a maritime service, and the duties of the respective parties arose out of, and are fixed by, the terms of a charter party of the ship, and the ship was the instrument used in performing the service. Under such circumstances it is my opinion that a maritime lien in favor of the charterer attached to the ship for the amount of the freight earned by the steamship by transporting the cotton from Shanghai to Kioto, and withheld from the charterer by the shipowners."

The Port Adelaide, 59 Fed. 174, 177.

Respecting *The Wyoming*, 36 Fed. 493 (1888, Mo. D. C.), the opinion shows a maritime lien enforced to recover duplicate freight paid by a consignee after

original freight had been collected in behalf of the steamer from the shipper.

The court, in deciding *The St. Joseph*, Fed. Cas. 12230 (1878, Mich. D. C.), allowed a lien as security for a claim based upon a bill of lading requiring the vessel to collect from consignees of cargo the charges accruing to rail carriers for transportation on land prior to receipt of the cargo by the vessel.

The Emma, Fed. Cas. 18218 (1876, Miss. D. C.), shows the enforcement of a maritime lien based upon the failure of the ship carrying goods under a C. O. D. bill of lading to remit to the shipper the value of the goods after deduction of freight charges.

A libel was recognized as available in *The A. M. Bliss*, Fed. Cas. 274 (1872, Mass. D. C.), where the opinion said:

> "If, then, the fact were as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners, if the ship should, for any reason, fail to perform the voyage; and this right might be enforced against the ship."
>
> *The A. M. Bliss*, Fed. Cas. 274, pp. 593, 594.

The Hardy, Fed. Cas. 6056 (1870, Minn. C. C.), involving an affreightment contract obligating the

ship to collect from consignees the sale price of cargo and also freight, enforced a lien against the vessel.

In *The St. Joseph*, Fed. Cas. 3908 (1855, Ill. C. C.), a lien was permitted in collection of an obligation under a general average bond.

In the case of *Church v. Shelton*, Fed. Cas. 2714, (1855, Mass. C. C.), the cargo owner was permitted resort to a maritime lien to collect money fraudulently obtained by the vessel owner through false representations relative to the existence of a salvage lien.

The decision in *The Panama*, Fed. Cas. 10703 (1846, N. Y. D. C.), granted a lien to recover freight advanced for a voyage never performed.

CONCLUSION

The maritime law was especially entrusted by the Constitution to this court for harmony of principle and uniformity of decision in adoption and adaptation in this country. The maritime lien is the distinguishing characteristic of this branch of jurisprudence. All owners of vessels and of cargo, engaged in commerce by water, are concerned in the existence and extent of such a lien for freight money —whether asserted against a vessel or against the cargo.

A maritime lien for freight returnable by the vessel is conducive to promptitude of adjustment, frequent in application, and vital to security of payment in many varying conditions: on shipments by foreign carriers or tramp vessels lacking local representation supporting process in *personam;* in transactions with domestic shipowners having inadequate capital or utilizing single-hull corporations; under affreightments by major lines in times of financial depression; in dealings with general ships covered by various charters and sub-charters, befogging personal responsibility; and in recoveries following sudden embargoes upon goods and unexpected commandeering of vessel tonnage.

Several other cases now pending are in abeyance awaiting the conclusion of this litigation (R. 26, 27, 32, 33).

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in conflict with a former decision of the Circuit Court of Appeals for the Sixth Circuit, and is in conflict with the great weight of authority reflecting the maritime law upon the point.

Further, if such decision of the Circuit Court of Appeals for the Ninth Circuit is not in conflict with the applicable decisions of this court, then the ques-

tion of law presented is undetermined by this court, and should be definitely settled in this case.

Hence petitioner respectfully submits that the question of law here presented justifies consideration by this court and the issuance of a writ of certiorari as prayed by the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

NO. 734

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent.*

BRIEF OF PETITIONER

Upon Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit

---

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INTRODUCTION

This brief is supplemental to petitioner's brief supporting petition for writ of certiorari and responsive to respondent's brief resisting such petition.

OPINIONS BELOW

Two opinions were delivered by the District Court. Both were written by District Judge Jeremiah Neterer being filed upon July 14, 1931, and August 4, 1931. The opinion on the original hearing (R. 26) was not reported; the opinion on rehearing (R. 32) was reported in 53 Fed. (2d) 492-495.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilbur and Sawtelle, with District Judge Norcross—written by Circuit Judge Wilbur) was filed September 8, 1932, (R. 64) and was reported in 61 Fed. (2d) 187.

JURISDICTION

The jurisdiction of this court is invoked under Judicial Code, Sec. 240(a) as amended by act of February 13, 1925, Ch. 229 (43 Stat. 938; 28 U. S. C. A. Sec. 347).

The decree of the Circuit Court of Appeals to be reviewed was entered January 10, 1933, (R. 86.) No petition for rehearing was ever filed relative to

such final decree. Petition for writ of certiorari was filed with the Clerk of this court February 27, 1933. Order granting such petition was filed April 10, 1933, (R. 99).

STATEMENT

In November, 1929, petitioner Krauss Bros. Lumber Company, as shipper, and respondent Dimon Steamship Corporation, as carrier, signed an affreightment contract, whereby certain lumber cargo was to be loaded in January, 1930, on the Pacific Coast at ports of Puget Sound and Grays Harbor aboard the steamship "Pacific Cedar," to be transported to the Atlantic Coast and to be discharged at the ports of Philadelphia and New York, all in consideration of freight, the rate and amount thereof to be determined by the following clause:

> "Rate of freight $10.00 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied." (R. 5, 9).

Pursuant to such engagement, said steamship "Pacific Cedar" loaded said cargo at agreed Pacific Coast ports in January, 1930, and, after transportation in due course, discharged the same at agreed Atlantic Coast ports in March, 1930. During such discharge respondent, in behalf of said steamship "Pacific Cedar," demanded and collected from petitioner the

freight on said lumber cargo at the rate of $10.00 per M. feet. (R. 5, 6).

During the month of January, 1930, the Luckenbach Steamship Company, a "regular intercostal carrier," moved similar cargo from Seattle, Washington, to Boston, Massachusetts, at a lower rate, to-wit: $8.50 per M feet. (R. 6).

Later petitioner demanded from respondent return of freight in the amount of the difference between the $10.00 rate paid and the $8.50 rate applicable. Such demand was refused. (R. 6).

Upon May 18, 1931, petitioner's libel in personam against respondent and in rem against said steamship "Pacific Cedar" was filed in admiralty, alleging for a cause of action the facts above summarized, seeking repayment of such excess freight, and asserting a maritime lien therefor (R. 3, 12.) Said steamship, upon due process in rem, was forthwith attached, and by respondent on bond was promptly released (R. 12, 16, 21).

On June 18, 1931, respondent filed exceptions to said libel upon two grounds:

(1) That no maritime lien existed (R. 26);

(2) That the cause of action alleged was non maritime in nature, and not within the admiralty jurisdiction (R. 25).

The District Court sustained both exceptions (R. 41.) The Circuit Court of Appeals reversed the District Court as to the exception in personam and affirmed the District Court as to the exception in rem (R. 86.) No petition for rehearing in the Circuit Court of Appeals was filed as to its final decree entered January 10, 1933.

ASSIGNMENTS OF ERRORS

To the extent now material, petitioner's assignments of errors are specified as follows:

(1) That the District Court erred in ruling by its memorandum decision, filed January 14, 1931, that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar," as a result of the claim and cause of action alleged by the libel (R. 45);

(2) That the District Court erred in ruling by its memorandum decision, filed August 4, 1931, that petitioner was not entitled to a rehearing, and in adhering to its former decision (R. 45);

(3) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and thereafter filed September 18, 1931, by adjudging that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar" (R. 45, 46);

(4) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and therafter filed September 18, 1931, by dismissing petitioner's libel and cause of action therein alleged (R. 46);

(5) That the District Court erred by its final decree of dismissal, signed September 14, 1931, and thereafter filed September 18, 1931, by awarding costs against petitioner and in favor of respondent (R. 46);

(6) That the Circuit Court of Appeals erred by its memorandum decision, filed September 8, 1932, reported in 61 Fed. (2d) 187, by ruling that no maritime lien existed in favor of petitioner and against the steamship "Pacific Cedar," as a result of the claim and cause of action alleged by the libel (R. 64);

(7) That the Circuit Court of Appeals erred by its final decree entered January 10, 1933, by dismissing the libel in rem and affirming the decree of the District Court in respect to the maritime lien (R. 86).

QUESTION PRESENTED

Whether a maritime lien exists against a carrying vessel in favor of a lumber shipper for return of excess freight money—being the difference between

the tentative maximum rate actually paid ($10.00 per M feet) and the applicable minimum rate rightly retainable ($8.50 per M feet) under affreightment contract stipulating:

> "Rate of freight $10.00 per M feet net measurement. * * * In event regular intercostal carrier moves similar cargo at lower rate such lower rate to be applied. (R. 5, 9, 26, 72, 73, 74, 82, 86).

ARGUMENT

As occasionally reflected by judicial comment, many of the early opinions of the admiralty courts in this country were not reported. Nevertheless, for many years, in the adoption and adaptation of the maritime law within our jurisdiction, inferior federal courts enforced against vessels maritime liens, based upon demands for return of freight or upon closely analagous claims.

Even if such history of the maritime lien asserted by petitioner, were not recorded by the authorities, the soundness of the principle underlying this particular lien would justify its present recognition, as suggested by *The Rebecca*. Fed. Cas. 11619. (D. C. Me., 1831.) In that case appears an opinion involving a libel in rem; where the court was struggling with the interpretation of the maritime law in an effort to determine the existence of a maritime lien

against a vessel for cargo damage or loss. The opinion, mentioned largely for historic review, said:

> "The ship and freight, and therefore indirectly the owners, to the amount of the value of the ship and freight, are, by the maritime law, bound to the performance of the charter party. * * *
>
> "The principle of reciprocal liens of the cargo on the vessel and the vessel on the cargo is established by the Ordonnance de la Marine * * * and is preserved in the Code de Commerce. * * * But this is not the introduction of any new and peculiar principle into the maritime code of France. It is merely sanctioning by formal action of legislation what had existed as customary law from time immemorial, and so it is considered and treated by the commentators on the Ordonnance and Code. * * *
>
> "It is objected that this is a case of the first impression, and that the reports furnish us with no decision in point. The reason has already been given, why the English reports furnish no case. The common law courts cannot give the remedy, and they will not allow the court of admiralty to take cognizance of the case. Whether it be, or be not, of the first impression in this country, I am unable to say. A very small portion only of the decisions of our courts of admiralty is in print, and we cannot, therefore, infer with certainty that the principle has never been here decided because no case is reported. But the true answer to the objection is, that *the law does not consist of cases, but of principles, and when a party claims the benefit of a principle, the true question presented for the consideration of the court, is, whether the law is so; if it is, he is entitled to the benefit of the rule, though he may be the first man who has invoked its aid.* In this case, my opinion is that the lien

> is sustained by the general principles of the maritime law, as well as by the imposing authority of the most respectable writers who have illustrated, by their labors, this branch of jurisprudence. I feel the more confidence in the opinion which I have adopted on an examination of the authorities, from being informed that it corresponds with that of merchants in this place most conversant in maritime commerce."
>
> *The Rebecca*, Fed. Cas. 11619 (D. C., Me. 1831).

An early case recognizing and enforcing a maritime lien for the return of freight money is *The Panama*, Fed. Cas. 10703 (D. C., N. Y. 1846), wherein a libel was filed in rem upon a bottomry bond. The assignee of the claim of charters, based upon freight advanced under the charter party, sought to recover thereon from the residue of the proceeds of the sale of the ship, held in court after the satisfaction of the bottomy bond. It appeared that the cargo was loaded by the charterer and freight paid, after which the owner breached the charter party by failure to cause the vessel to sail. The opinion was rendered by Betts, J., who held that the charterer was entitled to the lien upon the proceeds of the sale of the vessel by way of reimbursement for freight advanced. The opinion said:

> "On the sale of the ship and breaking up of the voyage by fault of the owner, the shipper of the cargo could have attached her in the hands of the purchaser as subject to that double lien:

(1) for the return of the cargo or its value; (2) *the repayment of the freight* advanced; and the purchaser would clearly have been allowed the amount of such liens to be deducted from the sum of the purchase money. The whole purchase money being paid into court, the adjustment of the rights of the parties in respect to it will now be the same as if it had been retained by the purchaser to await the judgment of the court and to be paid pursuant to judicial directions.

"Accordingly, I am of the opinion that Schmidt & Balshe acquired a lien upon the vessel to the amount of freight advanced by them under the charter party. That privilege passed to Quincy under their assignment, and he can, since the sale of the vessel, enforce the right against her proceeds in court, to the amount of his loss. * * *"

The Panama, Fed. Cas. 10703 (D. C., N. Y. 1846).

In the case of *Church v. Shelton*, Fed. Cas. 2714, (Mass. C. C., 1855), wherein the cargo owner sued in admiralty to recover from the vessel owner money paid as the result of fraudulent representations relative to the existence of a salvage lien, the appellate court sustained jurisdiction in personam because there would have been jurisdiction in rem, using the following language:

"And there can be no doubt since the decision of the Supreme Court of the United States in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 344, that the admiralty has jurisdiction of such a contract of affreightment in personam as well as in rem. Having juris-

diction over the entire contract, it will proceed to inquire into all its breaches and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve."

Church v. Shelton, Fed. Cas. 2714 (Mass. C. C. 1855).

The obligation of the cargo owner to contribute in general average is closely analagous to the obligation of the cargo owner to pay freight, since the freight is the food for the ship's voyage under fair weather and favorable conditions. While a general average contribution is the nourishment for the ship's sacrifices under foul weather and unfavorable circumstances.

With this background in mind, reference is made to *The St. Joseph*, Fed. Cas. 3908, (Ill. C. C., 1855), being to appeal in admiralty involving a libel in rem against a vessel to recover on a general average bond on account of the vessel's contribution for jettison of cargo. The claimant of the vessel denied the existence of the lien, claiming that the bond having been given, the lien had been waived. During the course of its opinion the court said:

"Average contribution is the creation of the maritime law, and is founded in the great principles of equity. * * * No subject can be more purely maritime than this. And it is said the contribution may be recovered in equity and in law. If the demand be a lien upon any property within the reach of the court, the proceed-

> ings may be in rem. And if any individual within the process of the court is liable, the proceedings may be against him in personam. The lien still continues on the property in the hands of the assignee. This doctrine is laid down in *Shepard v. Taylor*, 6 Pet. (31 U. S.) 675, and it has been the rule of decisions in the courts of the United States. A maritime lien adheres to the proceeds of the thing, into whose hands soever it may go, and the owner becomes personally liable, and may be proceeded against in personam. * * * It seems to be a settled principle that where the maritime jurisdiction attaches, the demand may be recovered in rem or in personam. It does not follow that where an action may be maintained on the contract, as in this case, the maritime jurisdiction may not be exercised."
>
> *The St. Joseph*, Fed. Cas. 3908, (Ill. C. C. 1855).

In another case involving a claim analagous to the demand for the return of freight, *The Hardy*, Fed. Cas. 6056 (Minn. C. C., 1870), a libel was filed in rem by a shipper to recover from the ship money collected by the master from consignees of cargo, representing the value of the cargo, the same having been carried under an agreement that the master was to collect both the purchase price of the cargo and the freight from the consignees. The court held that a lien existed despite the contention that the debt might have been recovered in an action for money had and received. The opinion of the appellate court used the following language:

"1. That a contract by which a steamboat navigating the public inland waters of the United States, engages, in consideration of freights to be earned, to carry for the libelant certain goods; and collect from the consignee the freight money and all charges, advances, and insurance on the goods, together with the price thereof, and after deducting the freight money, to pay to the libelant the balance, is not unusual in its character, and is essentially a contract for a maritime service, of which the District Court has jurisdiction in admiralty, in a proceeding in rem against the boat.

"2. That such a contract is within the scope of the master's employment, and is binding upon the owners and the vessel, in favor of a shipper who has no knowledge that the boat was at the time chartered by parties to be run for their own use and benefit."

The Hardy, Fed. Cas. 6056 (Minn. C. C., 1870).

In the case just reviewed the court went farther in the recognition and enforcement of a maritime lien than is necessary in the present litigation, since there the cargo owner was given the benefit of a maritime lien to recover the sale price of his cargo, collected along with freight money, while in the present litigation the cargo owner seeks the enforcement of a maritime lien to collect a portion of the freight money itself.

In *The A. M. Bliss*, Fed. Cas. 274, (D. C. Mass., 1872), a libel in rem was filed by a charterer, based

upon a claim of freight advanced to the vessel but not earned, because certain voyages contemplated by the charter were not prosecuted. It was held by the court that the charter was void for fraud. However, on the point of jurisdiction the court held that contracts of affreightment, whether by way of charter party or bill of lading, were within the admiralty jurisdiction, and that such a court would allow damages even though indirect. With respect to the lien for return of freight money, the opinion of the court said:

> "The District Court has full jurisdiction of contracts of affreightment, whether evidenced by charter party or bill of lading; and though the damages may in any case be somewhat indirect, as, for instance, if they arise out of a jettison which requires contribution, or out of a fraudulent payment of salvage by the master. Yet the mode in which the claim for compensation arises will not oust the jurisdiction; Dupont v. Vance, 19 How. (60 U. S.) 162; Church v. Shelton, Case No. 2714; The Panama, Case No. 10703. If, then, the fact were, as is alleged in the libel, that an advance of the freight had been made by the charterers in accordance with the terms of the contract, the advance would, in the absence of an express agreement to the contrary, be recoverable of the owners if the ship should for any reason, fail to perform the voyage; and *this right might be enforced against the ship.* The Panama, ubi, supra; The Pacific, Case No. 10643."

The A. M. Bliss, Fed. Cas. 274 (D. C. Mass., 1872).

Facts somewhat similar to those involved in *The Hardy*, Fed. Cas. 6056, *supra*, are found in the case of *The Emma*, *Fed.* Cas. 18218 (D. C. Miss., 1876), where a libel was filed in rem by a shipper, based upon a C. O. D. bill of lading, which required the vessel to transport the goods, collect from the consignees the price of the goods sold by the shipper to the consignees, and pay to the shipper the purchase price of the goods, less freight. It was held by the court that a lien existed in favor of the shipper against the vessel for the money collected by the master and not repaid. The opinion said:

> "It is, I believe, a settled rule, that where a cargo of goods delivered to a vessel upon a contract that the master shall convey them to some market, and there sell them for account of owner, until he makes a sale and delivers the goods he is acting as the master of the vessel, and not as the agent of the shipper; but that after he sells and receives the money he is agent of the shipper, and consequently that for any breach of contract of affreightment the vessel is liable, but for any default in payment of the money to the shipper the master is personally liable only. *But there is a marked distinction between such a case and one in which the consignor has already sold the goods to the consignee upon an agreement that money is to be paid upon delivery of the goods. In such case, the contract is entirely one of affreightment.* The master contracts for a certain sum to be paid as freight to transport the goods to the consignee and transport the money delivered to him by the consignee back to the consign-

or, or if the money is not placed upon the vessel by the consignee to retransport the goods themselves to the shipper. The duties assumed are entirely those of a common carrier and a common carrier is as much liable for a failure to transport and deliver money received by him for transportation as he is for a failure to deliver any other character of freight. The immense commercial business now transacted in this way can only be protected by this rule, which can be applied without infringing upon any established principle of admiralty, and is fully sustained in the case of The Hardy (Case No. 6056), decided by Judge Nelson. *The claim so far as proved must therefore be allowed as liens upon the vessel.*"

The Emma, Fed. Cas. 18218 (D. C. Miss., 1876).

In harmony with previous observation, it should hardly require statement to prompt the conclusion that an obligation to repay excess freight money in the hands of a shipowner is more closely related to the maritime affreightment than the obligation of the vessel owner to repay the shipper purchase price of cargo sold for the shipper's account. The debt on account of freight is inherent in the maritime contract of affreightment. The debt on account of the purchase price of goods is intimately connected with a common law contract of a sale of merchandise.

A similar case is reported in *The St. Joseph*, Fed. Cas. 12230 (D. C. Mich., 1878), where a libel was

filed in rem by forwarders and warehousemen, who delivered cargo to the respondent vessel, taking from the master a bill of lading which required the owner of the vessel to collect on delivery the charges due to libelants for storage and other advances made to rail carriers for land transportation. By the libel in rem libelants sought to enforce a lien against a vessel for non-payment of such charges. It was held by the court that the contract underlying libelants' claim was essentially and elementally a contract of water transportation, the collection of charges by the vessel owner or the master being a mere incident, and that admiralty would enforce, by means of the lien, the obligation of the ship to repay the charges collected by the master. The opinion said:

> "I see no reason to doubt the maritime character of this contract. The main business of the steamer was to transport the goods by water. This contract carriers with it such incidental and subsidiary undertakings as is usual in the trade and necessary for the convenient transaction of the business in which the propellers are engaged. * * * In the case of The Hardy, Case No. 6056, it was held by the learned District Judge for the District of Minnesota, that a contract by which a steamboat engages to carry goods and collect from the consignee the freight money and all charges, advances and insurance upon the goods, together with the price thereof, and, after deducting the freight, to pay libel-

ants the balance, was a maritime contract of which this court has jurisdiction by a proceeding in rem."

The St. Joseph, Fed. Cas. 12230 (D. C. Mich., 1878).

In *The New Hampshire*, 21 Fed. 925 (D. C. Mich., 1880), a libel was filed in rem by a shipper of cargo, loaded on board under an agreement that the master was to sell the same at port of discharge, and pay libelant the proceeds of the sale. The gist of the cause was failure of the master to repay to libelant the purchase price of the cargo. In this particular case the agreement was somewhat different than the agreement involved in *The Hardy*, Fed. Cas. 6056, *supra*, wherein the maritime lien was allowed. However, the ruling of that case was approved by the court, saying:

"If it were a simple case of a contract to deliver the cargo to a consignee named, and to collect from him the freight charges and advances, together with the price thereof, and, after deducting the freight, to pay to libelant the balance, and such a contract were shown to be usual and customary in the trade in which the vessel was engaged, I should find little difficulty in holding it to be an entire maritime contract *for which the vessel would be liable*. This was held to be the law in the case of The Hardy, 1 Dill. 460, and also by the learned judge of the District of Mississippi in the unreported case of The Emma."

The New Hampshire, 21 Fed. 925 (D. C. Mich. 1880).

With respect to *The Wyoming*, 36 Fed. 493 (D. C. Mo., 1888), the opinion shows the facts to be that freight was paid to the steamer upon a cargo by the shipper. Subsequently, duplicate freight was paid upon the same goods by the consignee. The money having been wronfully used to pay ship's expenses, it was held that admiralty had jurisdiction of the claim against the vessel for repayment. The maritime lien was enforced against the ship without any discussion in the court's opinion indicating any doubt as to the existence of the lien.

A case similar to *The New Hampshire*, 21 Fed. 925, *supra*, is found in *The Julia*, 37 Fed. 369 (C. C. La., 1889), involving a libel based upon an affreightment contract containing an obligation on the part of the master to sell the libelant's cargo and pay libelant a certain price net therefor. On this particular contract it was held that the sale of the cargo was the primary essence of the transaction, since transportation was unnecessary, providing the cargo was sold. However, it was assumed in the case that had the facts been as found in the case of *The Hardy*, Fed. Cas. 6056, *supra*, wherein a lien was enforced, the same rule would have been followed.

As observed in the petition for writ of certiorari, an opinion of the late Chief Justice Taft appears in

The Oregon, 55 Fed. 666 (1893—C. C. A. 6), wherein a maritime lien was enforced against a vessel to recover freight money which had been collected by the master and not paid to the charterer. In this case the vessel "Palms" had been chartered at a flat rate of freight, and thereafter was sublet by the charterer to a shipper at a higher rate of freight. On the discharge of cargo the shipper paid to the master the full higher rate. The charterer, to collect the difference between the higher rate received by the master and the flat rate rightly retainable by the shipowner, asserted a maritime lien by libel in rem against the vessel.

An examination of the court's opinion shows that while Chief Justice Taft discussed and accepted the jurisdiction of admiralty over the claim asserted, the maritime lien was assumed to exist and was enforced without comment. However the existence of the maritime lien was a legal essential to the decree of the court entered against the vessel. From the opinion of Chief Justice Taft the following extracts have been taken:

> "The libels were filed in the district court * * * against the propeller Oregon and the schooner Palms, * * *.
>
> "In the libel against the Palms, in addition to the foregoing averments, it was charged that the captain of the Palms had collected from the

consignee of the iron ore carried upon one of the trips, to whom the libelant had sold the tonnage for that trip, $104 more than the charter rate, which belonged to libelant as profit upon the sale of the tonnage, and which the captain turned over to respondents. * * *.

"The master in the district court found that *the two vessels had violated their contracts,* * * *He also found for libelant against the Palms for $104.* The district court confirmed the findings, and entered the proper decree. which was affirmed by the circuit court. The difference between the contract and going rates of freight when libelant bought tonnage to carry the cargoes for the lost trip was 80 cents a ton, making $840 damages chargeable to each vessel, as well as the $104 additional *against the Palms.* * * *

"There remains to consider only the $104 *charged against the Palms.* This was the profit of 10 cents a ton on one trip of that vessel where the libelant sold the tonnage to Harvey Brown at $1.30 per ton. * * * The captain of the Palms collected the entire freight from Brown, and turned it over to Gilchrist managing owner of the Palms. The 10 cents a ton, or $104, of the freight belongs to the libelant, and *the Palms or her owners* should pay the same to the libelant. But the jurisdiction of this court in admiralty to render a decree for the money is denied on the ground that the cause of action is not maritime, but is a mere right to sue for money had and received at common law. *As the collection of the $104 was incidental to the execution of the maritime contract sued on, and may be regarded as an overcharge of freight* by appellants against appellee under that contract, we think the amount fairly recoverable as damages for its breach, and therefore fully within

> the admiralty jurisdiction. The decrees of the circuit court in both cases are affirmed."
>
> *The Oregon*, 55 Fed. 666, 668, 669, 676, 677 (1893—C. C. A. 6).

As observed by original brief in support of petition for writ of certiorari, the decision made in *The Oregon*, 55 Fed. 666, *supra*, is in direct conflict with the decision of the Circuit Court of Appeals in the present litigation. In addition, the facts upon which the maritime lien asserted by petitioner stands in the present case are stronger foundation to support such a line than the facts in *The Oregon*, 55 Fed. 666, *supra*. There the charterer's claim was based merely upon an implied obligation; here petitioner's claim is based upon an express obligation contained in the affreightment contract. In view of the facts involved, if a maritime lien is to be denied to petitioner, it would seem essential that this court directly overrule the decision in *The Oregon*, 55 Fed. 666, *supra*.

In *The Port-Adelaide*, 59 Fed. 174 (D. C., N. Y., 1893), the opinion was written by Judge Bendict, from which it appears that a libel was filed by a charterer to recover from the shipowner freight collected by the latter, based upon a charter party which provided that the shipowner was to receive a flat sum for the use of the entire vessel on a certain voyage. As alleged by the libel, the spirit of this charter party

was violated by the owner of the vessel in loading on board at ports of call enroute into vacant space, cargo belonging to third parties, in which the charterer had no interest. The libel in rem against the vessel was filed upon the theory that the freight moneys collected by the owner of the vessel for the unauthorized transportation of cargo belonging to third parties was money to which the charterer was entitled by way of reduction of the charter hire. The maritime lien against the vessel was recognized and enforced, the opinion of the court saying:

> "It is said that if the freight collected at Kioto, and paid over to the shipowners, belongs to the charterer, the libelant's claim is against the shipowner for money had and received, and is not within the jurisdiction of the admiralty. But the service performed in earning the freight was a maritime service, and the duties of the respective parties arose out of, and are fixed by, the terms of a charter party of the ship, and the ship was the instrument used in performing the service. Under such circumstances it is my opinion that a maritime lien in favor of the charterer attached to the ship for the amount of the freight earned by the steamship by transporting the cotton from Shanghai to Kioto, and withheld from the charterer by the shipowners."
>
> *The Port Adelaide*, 59 Fed. 174, 177 (D. C., N. Y., 1893).

In the present litigation the obligation of respondent to repay to petitioner the amount demanded as excess freight arises out of an express agreement,

fixing the ultimate amount of freight; while in the case just discussed the maritime lien was enforced against the vessel upon no express provision of the charter party, since the charterer's right arose merely by implication from the provision in the charter party indicating that for a flat or fixed charter hire the charterer was entitled to the whole cargo space of the vessel, even though the same was not in use for the carriage of cargo loaded by the charterer. Here again is potent precedent in support of petitioner's claim, based upon less favorable facts than those brought to this court by petitioner.

Because of the similarity of facts involved, special emphasis may be justified with respect to *The Oceano*, 148 Fed. 131 (D. C., N. Y., 1906.) In that case the opinion was written by District Judge Hough, and the proctors representing the litigants were specialists in maritime matters, John M. Woolsey, now District Judge, being proctor for the shipowner.

In this case it appears that libelant chartered the vessel "Oceano" for a voyage from Philadelphia to Japan. The charter party required that money for the vessel's disbursements be advanced by the charterer on account of the freight at the port of loading, such advances to be deducted from the freight earned under the charter party. Accordingly, money was

advanced by the libelant, receipt for which was signed by the master, reciting the same to be "on account of the freight under this bill of lading," and reciting that the same is to be "deducted in all cases from the freight earned."

Upon the vessel having arrived at destination, the libelant's agent in Kobe settled the accounts with the master, paying over the balance of the freight money, but through some inadvertence in calculation of the final settlement, a substantial sum was not deducted or credited on account of original advances made toward the freight. The erroneous settlement was reduced to writing and signed by the master. Subsequently a libel in rem was filed to recover the excess payment of freight. Attack was made upon the admiralty jurisdiction of the court, and upon the existence of a maritime lien. By its ruling the court maintained the jurisdiction and foreclosed the lien against the vessel for the amount of the excess freight owing. The court's opinion said:

> "The claimant's real objection to the demand in suit is that libelant is in truth suing for money had and received; that all the occurrences on which the suit is based arose after the fulfillment of the charter party, that the action is really therefore in assumpsit and lies only at common law. It appears to me, however, that the facts found herein constitute on the part of the claimant a breach of its charter party obligation to

repay to the libelant the entire amount of the Philadelphia advance. Whether the settlement at Kobe be regarded as an overpayment by the libelant or an under payment by the claimant, the fact remains that the claimant procured an advance of its chartered freight, promised by its charter party to repay it, and has persistently refused to do so. In my opinion, therefore, this is really a cause of affreightment, and admiralty has 'jurisdiction of all contracts of affreightment though the damages may in any case be somewhat indirect.' The A. M. Bliss, 2 Low. 103, Fed. Cas. No. 274. The damages here arise in a singular manner, but the same doctrine is laid down in Church v. Shelton, 2 Curt. 271, Fed. Cas. No. 2714, where the 'indirection' is even more marked. *'It follows from the view taken of the subject-matter of this action that the cause may be brought in rem.* The charter party especially provides that to the due execution thereof there shall be bound not only the parties themselves, but also 'the vessel's freight, tackle and appurtenances. and the merchandise to be laden on board.' It is truly pointed out by the commissioner that these words taken literally create a conventional lien on 'tackle and appurtenances' even if there be no lien upon the steamer. The quoted expression is possibly, if not probable, a misprint for 'vessel, freight, tackle and appurtenances.' But whether this be true or not, I think jurisdiction should be sustained on broader grounds. *As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom.* The Director (D. C.), 26 Fed. 708. Damages sustained by a charterer through breach of a charter contract constitute a lien on the vessel. The Panama, Olcott, 343, Fed. Cas. No. 10,703.

"It cannot be denied that unless explicitly excluded by the contract of charter party both shipper and owner may pursue their remedies for breach of contract by actions in rem. I think that much stronger words than those last quoted from this charter party should be required to oust the charterer of his usual remedy. It is strongly urged that the A. M. Bliss, supra, is inconsistent with recognition of a right of action in rem. But the learned court there drew a distinction between 'loans made on a pledge of the freight' and 'advances of freight.' The former do not imply a pledge of the ship, and failure to pay constitutes no breach of the charter party. But a failure to repay an 'advance of freight,' on the completion of the voyage was there distinctly recognized as being a breach of the charter party. As above stated, I consider the claimant's action herein as amounting to a deliberate refusal to repay an 'advance of freight' and therefore constituting a breach of the charter party that gave birth to the freight."

The Oceano, 148 Fed. 131, 132, 133 (D. C., N. Y., 1906).

By brief of respondent, resisting petition for writ of certiorari in this cause, it is asserted (p. 18) that "the only reported case involving similar facts which can be considered in point is the case of *Israel v. Moore & McCormack Co.* (D. C.), 285 Fed. 919, 920, where it was held that there was no jurisdiction in admiralty at all, but only an action in assumpsit." This extravagant and inaccurate assertion on the part of respondent is squarely met by *The Oceano*, 148 Fed. 131, *supra*, where the facts are extremely analagous.

It seems to petitioner that there is no basis for any substantial distinction between the facts in *The Oceano*, 148 Fed. 131, *supra*, and the facts upon which petitioner asserts the existence of a maritime lien in the present litigation. The only difference between the two cases on the facts is a difference fortifying petitioner's contentions. In *The Oceano*, 148 Fed 131, *supra*, the claim of the charterer for the return of excess freight was based solely upon an inadvertence or error in calculating the amount of advances to be credited upon freight moneys due. In the present litigation, petitioner's claim is based upon an express provision of the contract of affreightment, entitling petitioner to pay a certain minimum rate of freight.

In *The John Francis*, 184 Fed. 746 (D. C., Ala., 1911), a maritime lien was enforced against the vessel for repayment of demurrage and other charges demanded by and paid to the master at the port of discharge. It is true that this case did not involve the assertion of a maritime lien for freight as such, but it did involve the enforcement of a maritime lien for the collection of a claim closely analagous to freight, since demurrage is essentially nothing but additional freight charged for unauthorized use and delay of the vessel, not in contemplation when the amount of freight was determined. In this case the

demurrage having been improperly demanded by the master of the ship, the cargo owner was held to be entitled to a maritime lien to coerce reimbursement.

In *The Ada*, 233 Fed. 325 (Md., D. C., 1916), there is disclosed a libel in rem for excess freight collected by the steamer. The facts upon which the maritime lien was enforced were that cargo had been loaded aboard the vessel without a bill of lading having been signed by either the master or the ship's agent, but by the charterer alone. At the port of discharge the master collected freight in excess of the amount due. The result in this case was approved by the opinion in *The Esrom*, 272 Fed. 266 (1921, C. C. A. 2), which said:

> "So, too, the ship is then bound by the charterer's bill of lading, under which the freight is prepaid, and cannot collect further freight at destination. The Ada (D. C.), 233 Fed. 325."
>
> *The Esrom*, 272 Fed. 266, 271 (1921—C. C. A. 2).

In *The G. A. Tomlinson*, 279 Fed. 786 (1922, N. Y., D. C.), a libel in rem was enforced in favor of a shipper against the vessel for return of freight money because of delivery by the vessel of cargo at one berth, in violation of a bill of lading requirement, designating another berth. Here, again, a lien is recognized and enforced against the ship for violation of an af-

freightment contract, even though such violation did not result from damage to cargo. The court's opinion said:

> "Exceptions to the libel have been filed on the ground that no maritime lien is shown and that an action in rem is not maintainable, since to create a maritime lien the ship must be personified, and a breach of duty shown by the ship as such. It is argued by respondent that a breach of contract of affreightment for refusing to load or unload cargo at a specified place, though actionable in personam is not actionable in rem, if the merchandise was delivered in a safe and sound condition."
>
> *The G. A. Tomlinson*, 279 Fed. 786, 787 (1922, N. Y., D. C.).

In the case just reviewed the opinion observes that the attack upon the existence of a maritime lien was sought to be supported by language contained in *The Saturnus*, 250 Fed. 407, (C. C. A. 2.) This attack was defeated by the court, which observed that the denial of a maritime lien against the vessel in *The Saturnus, supra*, was predicated upon the fact that the cause of action was for the breach of an executory contract because of failure to load cargo at all. The facts before the court were distinguished from such a situation, and recovery was allowed with the enforcement of a maritime lien.

In *The Muskegon*, 10 Fed. (2d) 817 (D. C., N. Y., 1924), the right of a shipper to recover freight paid

to the shipowner by means of a maritime lien was directly recognized. In that case it appeared that the shipper's goods were loaded aboard and carried to destination under bills of lading issued and signed by the charterer's agent. The full freight was paid by the charterer to the ship. Notwithstanding this fact, at destination delivery of the goods to the consignees was refused without payment of duplicate freight, because freight money had not been paid by the charterer's agent to the charterer. Over objection to jurisdiction and to the existence of a maritime lien, the shippers were allowed a recovery in admiralty and a foreclosure of the lien.

In this case the facts disclose full performance and right delivery by the ship, except only for the extortion of the master—facts which make the case, in principle, closely analagous to facts involved in the present case.

In *The Capitaine Faure*, 10 Fed. (2d) 950, (1926—C. C. A. 2), is found an extended opinion, wherein the facts are not particularly applicable to the present review. However, as a general proposition of law, the opinion uses the following language:

> "But an action in rem lies for the breach of a contract of affreightment where the goods have been actually delivered and received on board.

That such is the established law is not controverted or in any way questioned in this suit."

The Capitaine Faure, 10 Fed. (2d) 950, 961, (1926—C. C. A. 2).

In the case of *The Henry W. Breyer*, 17 Fed. (2d) 423 (D. C., Md., 1927), shippers claimed to be entitled to recover prepaid freight because the vessel had wholly failed to break ground on the voyage after cargo was loaded. The lien was allowed and foreclosed.

The Fredensbro, 18 Fed. (2d) 988 (Pa., D. C., 1927), involved an obligation to return prepaid freight. The opinion shows the freight was paid by the charterer in advance as required by the charter party, which contained a clause to the effect that the freight was not to be returnable, even if the ship was lost during the voyage. The cause was instituted both in personam and in rem, an attack being made upon the existence of the lien by exception which was overruled. The opinion of the court said:

"It is the contention of the exceptants that a suit in rem will not lie for the return of freight money paid in advance under the terms of the charter party. The facts set out in the libel are not similar to those in Israel v. Moore & McCormack (D. C.), 295 Fed. 919, cited by the exceptants. There the libelant had voluntarily paid the entire freight money for a cargo, part of which, unknown to the shipper, had been jetti-

soned during the voyage. Under those circumstances Judge Hand held that if the libelant was entitled to recover at all it was by an action at law in quasi contract."

The Fredensbro, 18 Fed. (2d) 983, 984 (Pa., D. C., 1927).

In connection with the language just quoted, and, in fact, throughout the entire consideration of the present review, it must be kept in mind that petitioner's claim is based upon an express provision of the affreightment contract.

Previously, the analogy between a contribution for general average and an obligation for freight, has been noted. In view of such analogy, reference is made to *The Emilia S. DePerez*, 22 Fed. (2d) 585 (Md., D. C., 1927.) The libel in that case involved a claim by cargo owners to recover for general average loss, after a general average statement had been made by average adjusters, acting in behalf of the shipowner, and cash deposits paid to secure the amount due as cargo's contributive share. Upon a completion of the adjustment it was disclosed that a substantial sum of money still remained. A recovery was allowed in rem against the vessel.

This case is most certainly directly opposed to the theory of the District Court in the present cause, in respect to the ruling to the effect that there could be

no lien against the ship for freight after the cargo and vessel had been separated by the discharge at destination, and the physical aspects of the maritime service concluded. The opinion in *The Emilia S. DePerez, supra,* is support for the theory found elsewhere in the decisions, to the effect that the maritime transaction is not concluded, in law, until all of the rights of the parties arising from the contract have been settled, as respects all of the elements of such a contract, to-wit: ship, cargo and freight. The opinion, in supporting the lien against the vessel, said:

> "It therefore follows, from the very nature of general average, and from the principle that 'the vessel is bound to the cargo and the cargo bound to the vessel,' that *the vessel must be liable in rem* for its portion of the general average loss. The Allianca (D. C.), 64 Fed. 871, affirmed C. C. A. 79 Fed. 989; Dupont de Nemours v. Vance, 19 How. 162, 168, 15 L. Ed. 584."
>
> *The Emilia S. DePerez*, 22 Fed. (2d) 585, 586 (Md., D. C., 1927).

The decision of the Circuit Court of Appeals for the Ninth Circuit in the present litigation, upon careful scrutiny, seems logically quite inconsistent with its opinion in the case of *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, (1929—C. C. A. 9.) The opinion in the former decision was written by District Judge Bean, sitting with Circuit Judges Rudkin and Dietrich. From the opinion it appears

that upon the arrival of a shipment at destination, delivery of cargo was refused until the shipper had paid a substantial sum representing certain expenses incurred by the shipowner incident to discharge, storing and reloading the cargo at some port of call, justification for such expense being claimed on account of the unsafe conditions at the port of destination.

Attack upon the cargo owner's recovery of such expenses was made upon the theory that the admiralty court had no jurisdiction, and that no maritime lien existed. In overruling such a contention, the court's opinion said:

> "It is urged by the appellant that the matter here involved is not cognizable in admiralty. But the issue between the parties cannot be determined without a consideration and review of the terms of the bill of lading, and, as said by Gibson, District Judge, speaking for the Court of Appeals in 286 Fed. 918: 'From time immemorial the construction of such contracts, and the determination of issues arising out of them, has been part of the duties of courts of admiralty.' U. S. Shipping Bd. v. Banque Russo Asiatique. See, also, The G. A. Tomlinson (D. C.) 279 F. 876; The John Francis (D. C.), 184 F. 746; The Lake Eckhart (D. C.), 31 F. (2d) 804, 1924, A. M. C. 498. * * *
>
> "For the purposes of this question the averments of the answer must be and are deemed to be true. *The undertaking of a ship* to deliver goods, as evidenced by the bill of lading, is, of

course, absolute, except so far as it may be relieved either because the venture was frustrated, or by the terms of the bill of lading."

Tatsuuma K. K. K. v. Robert Dollar Co., 31 Fed. (2d) (1929—C. C. A).

As noted with respect to other authorities cited, the cargo owner's claim of a maritime lien was predicated entirely upon an implied obligation arising out of the bill of lading, while in the present cause petitioner's claim is predicated upon an express provision of the booking contract.

With respect to *Tatsuuma K. K. K. v. Robert Dollar Co.*, 31 Fed. (2d) 401, *supra*, it may be suggested that the basis of the libel was not a claim for return of freight money. Meeting such a suggestion, it seems accurate to respond that in principle there is no difference between claim based upon a recovery of freight and a claim founded upon the recovery of expenses necessitated by unexpected difficulties in the prosecution of the voyage, since the freight is compensation for the services of the ship under favorable circumstances, while the extra expenses are compensation for services of the ship under unfavorable circumstances encountered upon the voyage.

Again mindful of the analogy between a general average contribution and an indebtedness for freight, reference is made to the case of *The Sudbury*, 33 Fed.

(2d) 293, (Cal., D. C., 1929), where a libel was filed in rem against a vessel, based upon a general average adjustment by the shipowner, alleging various errors in the adjustment. Attack being made upon the admiralty jurisdiction and the existence of a lien, the court said:

> "Respondent urges that this libel is not within the maritime jurisdiction because it is virtually an action for money had and received, for a fixed sum claimed as a part of a trust fund in the hands of the owners of the ship or the general average adjusters who made the adjustment, liability being based on transactions which occurred on land in the course of the adjustment, and therefore divorced from the maritime lien in general average. This question was fully considered and discussed in the Emilia S. DePerez (D. C.), 22 Fed. 2d) 585, 1927, A. M. C. 1839, which held that the admiralty jurisdiction attached to a libel in the nature of an action for money had and received, based upon a general average adjustment and virtually seeking an accounting for the trust funds. On the reasoning in that case, this court has jurisdiction in admiralty in the present case. * * *
>
> "The second exception must, however, be sustained, with leave to amend. The libel pleads the sums which the Sudbury and cargo should pay, and does not set forth the shares due from the Sudbury, which is alone libeled, *and which is liable for its shares only.*"
>
> *The Sudbury*, 33 Fed. (2d) 293 (Cal. D. C. 1929).

Turning from expressions of opinion by inferior federal courts recognizing and enforcing a maritime

lien against a vessel for the return of freight money, in whole or in part, attention is directed to decisions of this court reflecting its opinion concerning such a lien.

First, with respect to jurisdiction in rem, reference is made to *The Resolute*, 168 U. S. 438, 42 L. Ed. 533 (1897), where the opinion said:

> "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit in rem for a breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject matter being conceded, all other matters belong to the merits."
>
> *The Resolute*, 168 U. S. 438; 42 L. Ed. 533, 535 (1897).

Again adverting to the analogy between an indebtedness for freight and an obligation to contribute in general average, the case of *Dupont v. Vance*, 60 U. S. 162, 15 L. Ed. 584 (1857), is cited. In this cause a libel in rem was filed for failure to deliver a part of a shipment of gunpowder, the defense being based upon the fact that the cargo not delivered had been jettisoned. By this court it was held that the shipper was entitled to a maritime lien to collect the contributive share of the vessel for the general average

loss. With respect to the lien feature of the case the court said:

> "When a lawful jettison of cargo is made and the vessel and the remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, *he has a lien for that part of its value which the vessel and its freight are bound to contribute toward his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings in rem.* * * *
>
> "On full consideration, we are of the opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributive share of the general average compensation, and that the owner of the cargo may enforce payment thereof by a proper proceeding in rem against the vessel and against the residue of the cargo, if it has not been delivered."
>
> *Dupont v. Vance*, 60 U. S. 162; 15 L. Ed. 584, 586, 587 (1857).

From this case, and from other cases dealing with the maritime lien resulting from general average, and as a matter of principle, wholly apart from precedents which exist, it should logically and reasonably result that a lien should likewise exist against the vessel for return of freight money, since the general average adjustment and settlement is second-

ary and incidental to the affreightment, while the claim based upon either underpayment or overpayment of freight arises immediately from the agreement of affreightment itself.

By the petition for writ of certiorari and the original supporting brief, the case of *B. L. Harriman v. Emerick*, 76 U. S. 161, 19 L. Ed. 629 (1870), has been discussed. In that case the charterer of a vessel sued to recover a portion of freight paid because the cargo was returned to the port of loading undelivered. This court allowed the charterer to collect the freight by means of the foreclosure of a maritime lien. In principle, the only difference between that case and the present litigation is that there the vessel was obligated to return the freight because the same had not been earned, through failure to deliver the cargo, while here, the vessel owner was obligated to return a portion of the freight not earned, by virtue of the terms of the affreightment agreement, fixing the ultimate amount.

As observed by the petition and supporting brief, the maritime lien asserted in the case of *B. L. Harriman v. Emerick*, 76 U. S. 161, 19 L. Ed. 629, *supra*, was, without discussion, assumed to exist. However, its existence was essential to the decision in the case made by this court.

With respect to the cases of *Allanwilde Transportation Corporation v. Vacuum Oil Co.*, 248 U. S. 377, 63 L. Ed. 312 (1919), and *International Paper Co. v. Gracie D. Chambers*, 248 U. S. 387, 63 L. Ed. 318, (1919) the same comment may be made. Both of these cases involved libels in rem to obtain repayment of freight money not earned because the cargo had not been transported as contemplated by the affreightment contracts. The opinions in both cases review the merits of the controversy and determine the rights of the litigants by construing and interpreting the provisions of the affreightment contracts. In neither case is there the slightest suggestion that the maritime lien sought to be asserted did not exist. All such consideration would have been wholly unnecessary in the absence of the existence of a maritime lien, which was assumed without discussion.

This court has repeatedly ruled that in the absence of jurisdictional foundation, a decision on the merits will not be rendered.

Mansfield, etc., Co. v. Swan, 111 U. S. 379, 384; 28 L. Ed. 462, 464 (1884);

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 873 (1904);

Chicago B. & Q. R. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521 (1910);

U. S. v. Mayer, 235 U. S. 55, 70; 59 L. Ed. 129, 136 (1914).

In this litigation it seems to have been continuously the theory of the respondent that no maritime lien, as asserted by petitioner, could exist against the ship with respect to its claim for repayment of excess freight money wrongfully retained, because the physical obligations of the vessel had been performed according to the affreightment contract. This theory of respondent, in which the District Court and the Circuit Court of Appeals seem to have acquiesced, overlooks the essential maritime quality inherent in freight. On many occasions, particularly in respect to general average adjustments and in connection with the determination of rights under the limitation of liability statutes, the admiralty courts have recognized that every maritime venture has three primary elements: the ship, the cargo and the freight. That freight is a separate legal entity in the contemplation of the maritime law is illustrated by three cases, one of which was decided by this court:

U. S. A. v. Freights (S. S. Mount Shasta), 274 U. S. 466; 71 L. Ed. 1156 (1927);

Grays Harbor Stevedore Co. v. Freights, 42 Fed. (2d) 935, (D. C. Wash. 1930);

Bank of B. N. A. v. Freights, 137 Fed. 534 (1905—C. C. A. 2);

Bank of B. N. A. v. Freights, 127 Fed. 859 (D. C., N. Y. 1904).

A libel was filed in rem against sub-freights alleged to be due and unpaid in the hands of a subcharterer for carriage of merchandise, to which the United States, as owner of the steamship "Mount Shasta" was entitled on account of charter hire. Contention was made that such libel could not be substained because of the nature of the res against which the libel was directed. A contrary conclusion was reached by this court in *U. S. A. v. Freights (S. S. Mount Shasta)*, 274 U. S. 466; 71 L. Ed. 1157 (1927), which recognized the libel was entitled to the same recognition as a libel in rem against either ship or cargo.

In *Grays Harbor Stevedore Co. v. Freights and Sub-Freights*, 42 Fed. (2d) 985, *supra*, litigation was instituted by libel in rem filed in behalf of the stevedore company to recover for services in loading a certain vessel. The res against which the libel was directed was the debt owing to the owner of the vessel by a shipper, as freight for transportation of cargo loaded. The court ruled that the integrity and identity of the debt as freight owing by the shipper to the vessel owner was maintained and unimpaired, despite the fact that the record showed, without dispute, that a compromise settlement had been effected between the shipper and the owner of the vessel, so that the shipper owed no debt excepting by virtue of an agreement effecting the compromise adjustment.

In *Bank of B. N. A. v. Freights*, 137 Fed. 534, *supra*, and *Bank of B. N. A. v. Freights*, 127 Fed. 859, *supra*, it appears that the litigation involved a libel in rem against freight moneys traced to the charterer's bank account. Libelant had loaned and advanced to the charterer money to pay charter hire, on an agreement that freights collected by the charterer from shippers should be applied to the debt. It was held by the court that since the libelant bank had advanced the funds to the charterer on an oral contract that it was to be protected by a lien on freights from certain vessels, libelant had a lien enforcible in admiralty. The opinion of the Circuit Court of Appeals, in allowing the recovery by means of the maritime lien on freight money, said:

> "Concluding as we do, without any hesitation, that the libelant's lien extended to the deposits in Perry's bank account, we think it clear that the libelant was entitled to assert its lien upon those proceeds in a court of admiralty to the extent to which they could be traced, *and by an action in rem*. The action being one to enforce a maritime hypothecation, jurisdiction is complete (numerous citations), and it is quite immaterial that, superadded to the lien and the remedy in admiralty the libelant may also have had an equitable lien and a remedy in a court of equity to reach the proceeds in the bank account of Perry as its fiduciary."
>
> *Bank of British N. A.*, 137 Fed. 534, 538 (1905—C. C. A. 2).

The decisions upon which petitioner relies in its assertion of a maritime lien in the present cause having been reviewed, it is approprate to comment upon the cases tendered by respondent as support for its contentions that such lien does not exist. Apart from discussion of petitioner's authorities, brief of respondent resisting petition for writ of certiorari cites only the following cases:

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore. 1901);

Brown v. West Hartlepool, etc., Co., 112 Fed. 1018 (1902—C. C. A. 5);

The S. L. Watson, 118 Fed. 945 (1902—C. C. A. 1);

The Poznan, 276 Fed. 418 (D. C., N. Y. 1921);

The G. A. Tomlinson, 279 Fed. 786 (D. C., N. Y. 1922);

Israel v,. Moore & McCormack Co., 295 Fed. 919 (D. C., N. Y. 1920);

Compagnie, etc., v. Bonnasse, 19 Fed. (2d) 777 (1927—C. C. A. 2);

Pillsbury Flour M. Co. v. Interlake S. S. Co., 40 Fed. (2d) 439, (1930—C. C. A. 2);

United Fruit Co. v. U. S. S. B. E. F., 42 Fed. (2d) 222 (D. C., Mass. 1930);

Vanderwater v. Mills, 60 U. S. 82; 15 L. Ed. 554 (1857);

The Keokuk, 76 U. S. 517, 19 L. Ed. 744 (1870);

Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, 67 L. Ed. 364 (1923).

Preliminary to special comment, petitioner feels safe in the broad assertion that no one of these cases is persuasive authority for a denial of the maritime lien claimed by petitioner. Examination of most of the cases shows that they are not even in point.

In *Taylor v. Weir*, 110 Fed. 1005, it appears that libel in personam was filed to recover broker's commissions claimed to have been earned in negotiating a charter party. The opinion indicates there was involved no question of a maritime lien. The court merely held that a contract to make in the future a maritime contract is not necessarily maritime, saying:

> "The test is to be applied to the subject and not to the object. It is the subject matter of the contract which must be maritime, and not the mere object—the ship. Zeigler v. The Paola R. (C. C.) 32 Fed. 174. The fact that the agreement for commissions constitutes a clause in the charter party does not make it a maritime contract."

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore., 1901).

This decision is simply not in point, and petitioner is at a loss to appreciate the reason for its being cited to this court.

In the case of *Brown v. West Hartlepool, etc., Co.*, 112 Fed. 1018, (1902—C. C. A. 5) no consideration of a maritime lien is disclosed. The libel filed was in personam by brokers against the shipowner to recover compensation as agents for the negotiation of a charter party. The case is very similar to that of *Taylor v. Weir*, 110 Fed. 1005, *supra*, which is cited and followed. The decision is entirely beside the point under consideration in the present litigation.

The S. L. Watson, 118 Fed. 945, does actually involve a libel in rem. The basis for the litigation was a contract of affreightment, covering a fleet of several barges, made with the owner thereof for a series of voyages by each barge. No claim was made by the libelant on account of any voyage which had actually been performed, the libelant's claim being based solely upon a failure to load and carry contemplated cargo. The opinion of the court states:

> "The only claim is for the breach of a contract, which, so far as the remaining three cargoes were concerned, was completely executory."
>
> *The S. L. Watson*, 118 Fed. 945, 952 (1902—C. C. A. 1).

In effect, the opinion of the court in this case merely denied a maritime lien upon a particular barge for the failure of the owner of several barges to cause his fleet to load and carry cargoes contemplated by a

general contract of affreightment affecting the entire fleet. The opinion says that as regards the barge subjected to the libel, there had never been a union of cargo and vessel. With the denial of the lien in this case petitioner has no quarrel, since the case undoubtedly announces the true rule upon the particular facts involved. However, the case is not in point in the present litigation.

It is true that a libel in rem is involved in *The Poznan*, 276 Fed. 418, (N. Y. D. C. 1921). By the opinion it appears that the libel was filed both in rem against the ship and in personam against the shipowner and the charterer, upon a claim by shippers for the return of freight money and damages because the vessel failed to discharge cargo at port of destination, returning the same to the port of loading, and because cargo had been pilfered and damaged. However, there is no denial of a maritime lien in this case, the court having recognized and enforced a lien, despite the fact that the bills of lading were signed by the charterer. The opinion of the court merely said:

> "Most of them (bills of lading) were in fact signed by the company (charterer) but a few by the master. So far as concerns the ship, it makes no difference. Being once laden she was bound for right delivery, though the charterers sign."
>
> *The Poznan*, 276 Fed. 418, 432 (D. C. N. Y. 1921).

Based upon the language quoted, respondent's brief suggestively argues that a maritime lien arises only because a vessel failed to make "right delivery" of cargo. Petitioner's response to such a suggestion is that the phrase "right delivery," properly interpreted, includes not only the physical but the legal obligations of the ship.

The G. A. Tomlinson, 279 Fed. 786, (D. C. N. Y.) 1922) is one of the cases upon which petitioner has relied, the same having been heretofore discussed in this brief. It seems to afford no consolation to respondent.

The case of *Israel v. Moore & McCormack Co.*, 295 Fed. 919, (D. C. N. Y. 1920), is not in point upon a consideration of the existence of a maritime lien, since the libel in that case was one in personam. The decision, although strenuously urged by respondent in its attack upon admiralty jurisdiction in the present litigation, in both lower courts, was discussed and overruled by the Circuit Court of Appeals for the Ninth Circuit in its opinion in this cause, concluding that the admiralty court had jurisdiction of petitioner's libel in personam (R. 70, 71).

Another case cited by respondent involved no consideration of the existence of a maritime lien. In *Compagnie, etc. v. Bonnasse*, 19 Fed. (2d) 777,

(1927—C. C. A. 2) libelant, as a time charterer of a vessel, which caught fire resulting in a general average loss to cargo, sued in personam to secure the ship's contributive share, the shipowner having obtained from a bank a general average bond in favor of libelant. The assets and liabilities of such bank were acquired and assumed by another bank. In the litigation libelant named the original obligor on the bond and the successor bank as respondents. A third bank was joined as a garnishee respondent. The jurisdiction of admiralty was attacked with respect to the libelant's general average claim and the incidental garnishment. By the court it was held that the original general average bond was maritime; that while the agreement of the respondent bank to acquire and assume all the assets and debts of the original obligor on the bond was doubtless inclusive of some non-maritime obligations and debts, the liability of the bank to the libelant on the bond thus assumed was maritime, and the funds garnished were held to be properly impounded in admiralty. However, as already observed, the case involved no question of a maritime lien asserted against a vessel. The decision was cited by pettiioner to both lower courts in support of petitioner's claim that admiralty had jurisdiction in personam of the present litigaiton.

In *Pillsbury Flour M. Co. v. Interlake S. S. Co.*, 40 Fed. (2d) 439, (1930—C. C. A. 2), examination of the opinion uncovers no consideration of the existence of a maritime lien. The libel was filed by a cargo owner against a shipowner for cargo damage to wheat under a bill of lading providing for transportation and "winter storage" on the Great Lakes from November to the following April. The court merely held that the bill of lading contemplated two distinct services, one of carriage by water and the other of winter storage of grain. The decision by no stretch of imagination is in point at the present stage of this litigation.

Likewise another case mentioned by respondent to this court involves no question of a maritime lien. In *United Fruit Co. v. U. S. S. B. E. F.*, 42 Fed. (2d) 222 (D. C. Mass., 1930), an action at law was commenced in the state court and removed to the federal court. The basis for plaintiff's claim made it necessary to determine whether a certain "operating agreement" between the Shipping Board, as owner, and a certain steamship company, as agent, was of such a maritime nature as to be subject under the Suits in Admiralty Act to adjudication outside of the District Court. It was held that while the operating agreement contained maney non-maritime stipulations, the same were all merely incidental to the maritime fea-

tures of the contract, and hence admiralty alone would have jurisdiction under the statute mentioned. Once again the case is not in point in determining the existence of a maritime lien.

Of the three cases decided by this court, cited by brief of respondent, comment is first made with respect to *The Keokuk*, 76 U. S. 517, 19 L. Ed. 744 (1870). In this case a libel in rem was filed by shipper of wheat loaded into a barge without the knowledge of the barge owner, who was also the owner of the steamship "Keokuk." In ignorance of the loading of wheat aboard the barge, the steamship failed to take the barge in tow. The barge sank while alongside the dock. This court concluded from the evidence that the cargo of wheat had never been accepted by the steamship or its owner, that no contract of affreightment had ever been made, and that, hence, no lien existed against the steamship. The opinion of this court observed:

> "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo

to which it relates has been delivered to the custody of the master or someone authorized to receive it. The Freeman v. Buckingham, 18 How. 188, (59 U. S. XV, 343)."

The Koekuk, 76 U. S. 517; 19 L. Ed. 744 (1870).

If the decision just summarized is of any value in the present litigation, it is suport for the contentions of petitioner, and not for the contentions of respondent, since in the present litigation there was union of cargo and vessel, under the provisions of an affreightment contract, evidenced by an instrument in writing signed by both cargo owner and vessel owner. And although the quoted language of this court was used in consideration of different facts, it still is suggestive of the existence of a lien upon the present facts. To repeat:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master;"

The Keokuk, 76 U. S. 517; 19 L. Ed. 744 (1870).

Discussion of the remaining two cases decided by this court, cited by brief of respondent, has been deferred because they are the only authorities which apparently influenced the Circuit Court of Appeals in its denial of the maritime lien in this cause (R. 72, 73). Reference is made to *Vanderwater v. Mills*,

60 U. S. 82; 15 L. Ed. 554 (1857), and *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364 (1923). By its denial of a maritime lien in the present litigation, the Circuit Court of Appeals misapplied and misinterpreted the language of this court in these two decisions.

In the earlier case the opinion discloses that the owners of the vessel "Yankee Blade" and the owners of the vessel "America" entered into a contract with respect to the transportation of certain passengers and cargo, whereby the "Yankee Blade" was to perform the carriage from New York to Panama, and whereby the "America" was to continue the carriage from Panama to San Francisco. The "Yankee Blade" having refused performance, the owners of the "America" commenced an action in rem against the "Yankee Blade" for breach of contract. This court held that there was no charter party or other contract of affreightment, but merely a contract of special and limited partnership in the business of transporting passengers and cargo between the initial port of New York and the final port of San Francisco. A maritime lien was asserted against the vessel for failure and refusal to load or take aboard cargo and passengers. In classifying the arrangement between the owners of the two vessels as non maritime, this court said:

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common law."

Vanderwater v. Mills, 60 U. S. 82, 92; 15 L. Ed. 554, 557.

A careful review of this case prevents any serious contention that the facts involved there are parallel to the facts in the present cause. They are so dissimilar as to demand a different ruling as to the existence of a maritime lien, and to justify the use of language not necessarily applicable.

That portion of this court's opinion in the former case which was quoted by the Circuit Court of Appeals (R. 72, 73) reads as follows:

"This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel.

> Where there is a charter party, its covenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon. de Mar., b 3, tit. 1, art. 11), that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectee) by the covenants of the charter party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration."
>
> *Vanderwater v. Mills*, 60 U. S. 82; 15 L. Ed. 554.

From the phraseology quoted, respondent and the lower courts apparently join in drawing the conclusion that the maritime lien has been limited thereby so as to exclude the maritime lien asserted by petitioner. On the contrary, it seems to petitioner that the language quoted is support for its contentions. Hence the repetition:

> "The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party), and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter party, its covenants will define the duties imposed on the ship."
>
> *Vanderwater v. Mills*, 60 U. S. 82; 15 L. Ed. 554.

Throughout the entire litigation it has been assumed and conceded by both litigants and by both lower courts that petitioner's cargo having been load-

ed aboard the steamship of respondent under a valid contract of affreightment, the steamship owner would have had a maritime lien against the cargo for non-payment or underpayment of freight. Such being the law, in view of the criterion for determining the existence of a maritime lien adopted by this court in *Vanderwater v. Mills, supra*, it is difficult to appreciate resort to that case as authority for denial of the maritime lien asserted by petitioner as cargo owner against the steamship of respondent for repayment of excess freight. Certainly the phraseology of this court's opinion in *Vanderwater v. Mills, supra*, is broad enough to include a maritime lien for violation not only of the duty to deliver cargo in good condition and to deliver cargo at the time and place specified, but also the duty to transport the cargo for freight in a sum no more and no less than the amount agreed by the affreightment contract.

Discussion naturally leads to the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364, since there the case of *Vanderwater v. Mills, supra*, was cited and quoted.

Again in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364, this court considered the existence of a maritime lien founded upon the shipowner's failure to load cargo. In this case the libelant chartered the whole space of a steam-

ship for carriage of a full cargo of lumber. Most of the agreed shipment having been loaded, the vessel refused to accept the entire quantity tendered upon the excuse that the vessel had been laden to capacity. The libelant asserted a maritime lien for damages resulting from a portion of the cargo having been left on the dock unloaded.

In concluding that no maritime lien existed, this court used language quoted by the Circuit Court of Appeals (R. 73) as follows:

> "The maritime privilege or lien, though adhering to the vessel, is a secret one, which may operate to the prejudice of general creditors and purchasers without notice, and is therefore stricti juris, and cannot be extended by construction, analogy, or inference. Vanderwater v. Mills, supra. The contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See The Thomas P. Sheldon, 113 Fed. 779, 782, 783."
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364.

When the quoted phraseology was used by this court, once again the facts involved were wholly unlike the facts now presented in this litigation. Such

expression of opinion was, under the circumstances, necessitated and justified because the lien then claimed had not been adopted into the maritime law of this country by decisions over a period of many years. But the lien asserted by petitioner requires no extension of the ancient right beyond the limits of past judicial recognition. The principle involved by petitioner is not new, but old. In the present case it is only the method provided by the contract for determining the exact amount of freight which is unusual. The resulting admixture of right and remedy afforded by the maritime lien is ordinary.

The very same quotation employed by the Circuit Court of Appeals in denying the existence of a lien in the pending cause is urged upon this court by petitioner in support of its contentions. As announced by the opinion in *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*, it is not the contract alone which creates the lien. But the affreightment contract, plus the union of cargo and freight for the purpose of carriage thereunder, plus the violation of an express provision of that contract, fixing the amount of freight rightly payable and retainable, by withholding a sum in excess thereof, does create a lien.

Based upon the cases of *Vanderwater v. Mills, supra*, and *Osaka Shosen Kaisha v. Pacific Export*

Lumber Co., supra, respondent, in the lower cocrts and by its brief resisting petition for writ of certiorari, has argued that the maritime lien asserted by petitioner is non-existent because all liens available to the cargo owner and the shipowner must be reciprocal. That maritime liens arising under an affreightment contract must be mutual and reciprocal as between the cargo owner and the ship owner is a principle well entrenched in the maritime law by the announcements of this court. However, by petitioner's assertion of a maritime lien in this case no attempt is made to violate such principle, but rather to enforce the same.

The books contain innumerable admiralty decisions awarding to shipowners the benefits of a maritime lien against cargo for non-payment or underpayment of freight. Applying the test of mutuality and reciprocity it must follow that the cargo owner has an equal right to a lien against the vessel for return of freight unearned, in whole or in part. Petitioner suggests that the confusion of principle arising in the lower courts upon respondent's argument has resulted merely from the fact that upon a commercial venture the shipowner has possession of the cargo, while the cargo owner almost never has possession of the ship. In other words, resulting from practical necessities and custom, the maritime lien of the shipowner

against cargo for non-payment or underpayment of freight has always been limited with a possessory aspect, while the martime lien of the cargo owner against the ship for wrongful retention of freight or for other violations of contract has been free of any such possessory restriction.

In the lower courts it was argued by respondent, and it was suggested (R. 74) by the Circuit Court of Appeals, that the lien claimed by petitioner was unjust and inequitable because its existence was secret. The same criticism may be advanced with respect to all maritime liens. But the criticism is not justly directed to the lien asserted by petitioner in this case as a basis for its denial, although the criticism was appropriately made by this court in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, and in *Vanderwater v. Mills*, *supra*, where either there was no contract of affreightment in existence, or there was no actual union of cargo and ship under the contract.

In the opinion of this court in *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, resort is made to a quotation from the opinion in *The S. L. Watson*, 118 Fed. 945, *supra*, to the following effect:

> "The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been

> decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured."
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; 67 L. Ed. 364.

It is undoubtedly this language that prompted the Circuit Court of Appeals in the pending litigation to criticize the maritime lien asserted here as a secret lien. This criticism entirely overlooked the fact that in the case of *The S. L. Watson*, *supra*, in the case of *Vanderwater v. Mills*, *supra*, and in the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*, there was lacking one of the vital essentials to a maritime lien: either the affreightment contract itself or the union of cargo and ship thereunder. In the present litigation there is no such absence of any necessary element. In this case there is present a valid affreightment contract, evidenced by formal instrument in writing, signed by petitioner and respondent. In this case there is present a union of cargo and ship for the purpose of transportation under such contract. In this case there is present the subsequent payment and acceptance of freight money for the transportation service. With this background, can it possibly

be said with justice and accuracy that there is no such "visible occurrence relating to the vessel or cargo" as to support a maritime lien?

To reach a correct answer to this query, applying the test of mutuality and reciprocity of maritime liens, it is only necessary to ask whether a shipowner would have a maritime lien against cargo if the same were founded upon a contract of affreightment under which cargo had been loaded and transported, for which service the cargo owner had not paid the full amount of freight as agreed. In such a case the right of the shipowner would be recognized without hesitation. Petitioner submits that its right to a maritime lien in this case should be likewise recognized by this court.

CONCLUSION

Wherefore, petitioner prays:

(1) That this court will sustain the maritime lien asserted by petitioner in this cause;

(2) That this court will reverse the ruling and decree of the Circuit Court of Appeals for the Ninth Circuit, denying such lien and dismissing the libel in rem;

(3) That this court will direct said Circuit Court of Appeals to remand this cause in rem to the District Court for trial upon the merits.

Respectfully submitted,

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The Belfast, 74 U. S. 624, 19 L. Ed. 266	2
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 4.

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent*.

PETITIONER'S REPLY BRIEF.

INTRODUCTION.

Upon request by this Court made during oral argument, this brief is hastily prepared in reply to contentions suggested in respondent's brief and in answer to questions propounded by the members of this Court.

(1)

Jurisdiction in Personam.

By respondent's brief, upon the merits of the question as to the existence of a maritime lien upon the facts presented in this case, and by oral argument, respondent has sought to divert attention to the question of jurisdiction in personam.

The Circuit Court of Appeals for the Ninth Circuit determined that admiralty did have jurisdiction in personam of this cause (R. 65-72; 86). No cross petition for writ of certiorari was filed by respondent. The question may not properly be reviewed now.

However, to remove the possibility of any lurking doubt of the correctness of the ruling in personam, in addition to numerous cases already cited to this Court upon the lien question which indirectly but forcibly support admiralty jurisdiction in personam, petitioner here lists for ready access the authorities submitted to the Appellate Court upon that point:

Matson Navigation Co. v. U. S., 284 U. S. 352, 76 L. Ed. 336;
Morewood Et al. v. Enequist, 64 U. S. 491, 16 L. Ed. 516;
U. S. v. Freights (Mt. Shasta) 274 U. S. 466, 71 L. Ed. 1156;
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 68 L. Ed. 582;
Grant Smith-Porter Ship Co. v. Rhode, 259 U. S. 469, 66 L. Ed. 321;
Union Fish Co. v. Erickson, 248 U. S. 308, 63 L. Ed. 262;
Lehigh Valley R. R. Co. v. Cornell Steamboat Co., 218 U. S. 264, 54 L. Ed. 1039;
Ex Parte Easton, 95 U. S. 68, 24 L. Ed. 373;
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The Belfast, 74 U. S. 624, 19 L. Ed. 266;
McKinlay v. Moorish, 62 U. S. 343, 16 L. Ed. 100;

Chase Bag Co. v. U. S., 71 Ct. of Claims, 264, 1931 A.M.C. 191;
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The Fort Armstrong, 51 Fed. (2d) 1063;
United Fruit Co. v. U. S. S. B., 42 Fed. (2d) 222;
The Lake Eckhart, 31 Fed. (2d) 804;
The Compagnie Etc. v. Bonnasse, Et al., 19 Fed. (2d) 777;
The Kootenai, 295 Fed. 422;
U. S. S. B. v. Banquo Etc., 286 Fed. 918;
North Alaska Etc. Co. v. Larsen, 220 Fed. 93;
The Conveyor, 147 Fed. 586;
Evans v. N. Y. Etc. Co., 145 Fed. 841;
Graham v. O. R. & N. Co., 134 Fed. 454;
Gow v. Brauer S. S. Co., 113 Fed. 672;
Keyser v. Blue Star S. S. Co., 91 Fed. 267;
Keyser v. Blue Star S. S. Co., 81 Fed. 507;
Huntington v. Proceeds of the Advance, 72 Fed. 793;
The Electron, 48 Fed. 689;
The Fifeshire, 11 Fed. 743;
Coast Wrecking Co. v. Phoenix Insurance Co., 7 Fed. 236;
De Lovio v. Boit, Fed. Cas. 3776.

(2)

Ship Pledged to Performance of Contract—Not Bill of Lading.

The maritime contract in this case, operating to fix the rights and obligations between cargo owner and ship owner and also (after loading) between cargo and ship, was the original booking contract of affreightment pleaded as an exhibit to the libel (R. 3-12).

The libel alleges "that under the provisions of and in accordance with the aforementioned booking contract, Exhibit A," the respondent vessel loaded and carried petitioner's lumber cargo (R. 5).

The exception interposed against the libel was in the nature of a demurrer as to the existence of a maritime lien under which all allegations of fact are deemed admitted for the purpose of determining the legal question raised. Re-

spondent has not denied the allegation. Hence it is binding upon this Court, which may not properly speculate as to whether a bill of lading was issued, or as to the terms thereof, if issued.

However, for the sake of consideration, let it be assumed that a bill of lading was issued. In that situation still the booking contract of affreightment naming the S. S. Pacific Cedar as the carrying vessel, signed by petitioner as shipper, and by respondent as ship owner, continues unaltered; and the bill of lading serves only as a receipt for the cargo, subservient and subordinate in all other respects to the original agreement, at least to the extent of its express provisions, because the bill of lading was never negotiated to any third party (as evidenced by the fact that the litigants in this cause are the same parties who executed the initial contract).

In this connection, by respondent on oral argument, it was suggested that any such possible bill of lading, of necessity would have named the tentative rate of $10.00. This suggestion shows the extreme hazard of speculation beyond the record, since by actual practice in commerce by water where the shipper is not intending to sell or has not sold the cargo in advance of transportation, or when the shipper has hired all or most of the ship's space, it is common that bills of lading recite "freight as agreed", or like phrases. When a charter party or formal contract of affreightment has been signed, it is only where the shipper is selling the cargo and intends to negotiate the bill of lading through some bank to facilitate collection of the purchase price that any necessity arises for specification of the freight in the bill of lading.

Furthermore, the particular contract in this case provides:

> "This confirmation of engagement when signed becomes a binding contract which cannot be altered or cancelled except by mutual consent in writing." (R. 12, 13.)

Practically never is the bill of lading signed by the shipper. And it is almost preposterous to suppose that the parties would agree to a contingent determination of the rate and amount of freight by a contract which contemplated that immediately upon the issuance of the bill of lading the agreement would be vitiated and the contingent element eliminated.

Hence, petitioner submits the ship, having loaded the cargo under the contract as alleged, became pledged to the performance of all obligations therein, despite possible subsequent issuance of a bill of lading.

(3)

Freight "Rate to be Applied"—Not Rebate to be Returned—Is the Provision of the Contract.

Respondent has repeatedly argued this case on the theory of rebate. The theory is a misinterpretation of the language and the intention of the contract.

The contract of affreightment said:

> "Rate of freight, $10.00 per M ft. Net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate, *such lower rate to be applied.*" (R. 9.)

This phrasing is not even suggestive of rebate. It is mere evidence that the carrier, doing business in a highly competitive market, as an inducement had agreed to give the shipper the benefit of a rate lower than $10.00, if similar cargo was moved by a regular intercoastal competitor.

The soundness of petitioner's contention in this regard is demonstrated by asking the question: When did the lower rate become applicable—upon movement of similar cargo by a regular intercoastal carrier at a lower rate, or only after actual payment of the full $10.00 rate of freight by the shipper to the ship owner on delivery of cargo? It is obvious the lower rate was applicable as soon as move-

ment of similar cargo by a regular intercoastal carrier was definitely and actually initiated.

Again petitioner is sustained in its position by the observation that circumstance only has resulted in even the bare appearance of a rebate—the circumstance that the applicable rate was not demanded and accepted at the time cargo was discharged, resulting in the necessity of suit for repayment of the excess.

The contractual clause relative to the freight rate has no more semblance to a rebate than the frequent clause requiring that freight shall be paid at discharge in the monetary medium of the foreign port of destination at the rate of exchange there quoted on the date of loading. Such a clause and variations thereof are commonly employed for the purpose of fixing the manner and amount of final settlement for freight.

Illustrating resort to provision of this character, and declaring the maritime quality of the agreement when contained in an affreightment contract, is the case of *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 271 (1899—C. C. A. 5); 81 Fed. 507, 509 (1897—D. C. Fla.), approved by *Pillsbury Flour Mills Co. v. Interlake S. S. Co.*, 40 Fed. (2d) 439 (1930—C. C. A. 2).

Hence, petitioner submits the rebate objection urged by respondent is fallacious.

(4)

Freight Payment Coercive—Not Voluntary.

Respondent inaccurately has asserted that the payment of freight at the tentative higher rate was voluntary. But this claim cannot be urged in the face of the allegations contained in petitioner's libel when the same are read in the light of principles of maritime law affording the ship owner a lien upon cargo.

In this connection the libel alleges as follows:

"* * * which lumber was carried by said respondent steamship 'Pacific Cedar' to the Atlantic Coast of the United States and discharged at the ports of *New York, Philadelphia and Baltimore, between the first and twentieth days of March, 1930; and that between the first and twentieth days of March, 1930, at New York City, New York, the respondent Dimon Steamship Corporation, and the respondents S. S. 'Pacific Cedar', demanded, received and collected from libelant* the sum of $14,657.30, the freight on the aforementioned shipment at the rate of $10.00 per M ft." (R. 5, 6.)

In a subsequent paragraph the libel also alleged:

"that the agreed freight upon libelant's shipment on the respondent steamship 'Pacific Cedar', at the rate of $8.50 per M ft., which was the rate charged by said regular intercoastal carrier on similar cargo, amounted to $12,458.71, instead of the $14,657.30 *demanded and collected by respondents* from libelant for the freight on said shipment." (R. 6.)

From the language of the libel it appears that the lumber cargo was discharged at the three ports of New York, Philadelphia and Baltimore, in the order stated. From the same language it appears that freight payment was made in New York. From the same language it appears that within the period from the first to the twentieth of March, the discharge at all three ports was started and completed. From the same language it appears that within the same period the freight payment was made. From the same language it appears that the freight payment was made at the first port of discharge. Also from the same language it appears that the tentative higher rate was "DEMANDED" and "COLLECTED" by "the respondent Dimon Steamship Corporation and the respondent S. S. Pacific Cedar".

Fair and reasonable construction of the allegations quoted (as against an exception in the nature of a demurrer intended, not to test fine nicety of pleading, but merely to

raise the broad issue as to the cargo owner's right to a maritime lien), certainly forces the conclusion that such allegations sufficiently disclose the coercive element inherent in payment of freight by a shipper to a carrier in possession of the cargo. The allegations quoted alleged the ultimate facts. Had the allegations gone further, stating expressly that the freight payment was involuntary, the libel would have entered the field of conclusions. The pleading involved in this case is a libel in admiralty, where the practice recognizes liberality of pleading as acceptable—the pleading here is not a criminal charge of felony.

Although unnecessary to retreat to any such defensive position upon the point under discussion, it is a sound contention that the coercive or involuntary character of the freight payment is not an essential element of maritime lien in this particular case, since the basis thereof is not a tort, is not a statutory requirement, is not an implied obligation, but on the contrary, is an express contractual undertaking. Affirmatively stated, unless the payment of the tentative higher rate was made by the shipper after delivery of the cargo, and in full present knowledge of the facts and with intention to waive its rights, the lien would not be lost because of the express agreement determining the ultimate amount of freight.

To illustrate, suppose while the ship was en route, the freight had been prepaid at the full tentative rate, not as ultimate and final settlement, but as the mere advance to finance the completion of the voyage, such prepayment being made in ignorance of whether a lesser rate might become applicable under the contingent clause, it could not be concluded that the lien of the shipper would have been lost, for the admiralty decisions contain many approvals of such a lien.

However, petitioner reiterates that upon the allegations of the libel in this case its freight payment was actually not voluntary.

(5)

Lien Based Upon the Fact of a Lower Applicable Rate—Not Upon Knowledge Thereof.

By respondent it has been urged the libel fails to show sufficient facts to create a lien because containing no allegation that the ship owner, at the time of accepting payment of the full amount of freight on the higher tentative rate, knew of the movement of similar cargo by a regular intercoastal carrier at a lower rate and the resultant applicability of such lower rate.

But the gist of petitioner's libel is not a tort or a crime—merely a breach of an affreightment contract. This contract makes a certain fact, not knowledge thereof, the basis for the applicability of the lesser freight rate. To violate a contract of carriage, it is not requisite that a ship owner be acting feloniously or fraudulently; to breach a contract mere omission or oversight may be more than sufficient. In fact without exemptive clauses a carrier by water is an insurer, except as to an act of God.

Suppose that a shipper were asserting in court a claim based upon cargo damage, when was it ever considered necessary to allege or prove as an element of the lien against the ship that the carrier had intentionally caused the damage or had actual knowledge thereof? The basis for recognition of such a lien is the mere fact of damage (in the absence of express exemption), since the affreightment contract, for the performance of which the ship was pledged upon loading of cargo, was breached by such damage.

Carriers by water for many years have resorted to almost uniform practice of inserting in bills of lading clauses requiring that shippers within very limited periods of time serve written notice of claims for damage to or loss of cargo and for failure or delay in delivery thereof, as disclosed by innumerable decisions construing such clauses. Why have ship owners required the protection of such limitations? Because of frequent actual lack of knowledge of

the fact of damage, loss, shortage, or delay occurring with the continued ignorance of the carrier.

If knowledge of the cause or fact of damage to cargo were an element in the maritime lien against the ship, then an owner of lumber cargo could recover for breakage because apparent, but an owner of some expensive chemical requiring a constant degree of temperature for preservation, could not recover if the automatic refrigerating system or some special heating equipment temporarily failed to function, because the cause of damage was unknown and the fact of damage hidden by air-tight metal containers. Certainly no such discriminatory result has been permitted by the maritime law heretofore, and should not be permitted hereafter by the creation of any distinction between the cargo owner's rights in the assertion of a lien for undisclosed cargo damage and in the assertion of a lien for retention of unearned freight.

Hence petitioner repeats that the ship and cargo having been mutually hypothecated for the performance of the contract by loading of cargo thereunder, the ship became subject to the lien by the fact that the owner or master received freight money in excess of the agreed sum unaffected by the then knowledge or ignorance of the owner or master as to the correctness of the amount at that time. For similarity of facts see *The Oceano*, 148 Fed. 131 (D. C. N. Y. 1906).

(6)

Ship Guilty of Breach of Contract.

Respondent has claimed that the facts alleged by petitioner's libel were insufficient to support the maritime lien because not adequately disclosing fault or breach in the af-freightment obligation of the ship.

Like a corporation, a ship cannot default in its obligations or infringe upon the rights of another except through an act of commission or omission on the part of some indi-

vidual person. It is only by legal fiction that a corporation or a ship is ever held responsible for performance of any duty.

Under the maritime law, speaking in the abstract, what must a cargo owner show to establish a fault or breach by a ship resultant in a lien? Only these facts: (1) The existence of a contract of affreightment made for the ship by some authorized person whether owner, charterer, master or agent; (2) The loading under that contract of the contemplated cargo aboard such ship; (3) Non-performance of some maritime obligation under that contract by such owner, charterer, master or agent. The fact of union of ship and cargo for the purpose of carriage results in the mutual hypothecation of ship and cargo as a pledge to secure each to the other due performance.

Sufficient in this regard was alleged by the libel (R. 4, 5, 6), which said:

(1) That respondent Dimon Steamship Corporation owned and operated steamship "Pacific Cedar" as a cargo carrier;

(2) That petitioner entered into booking contract with the respondent Dimon Steamship Corporation (copy being attached as Exhibit A) under the terms of which space was engaged on the respondent steamship "Pacific Cedar" for loading on or about January 17, 1930, at certain named ports and for shipment to certain named ports of approximately a specified amount of lumber, which contract contained the agreement as to freight which constitutes the gist of this litigation;

(3) That "under the provisions of and in accordance with" such contract, the contemplated cargo was "loaded upon respondent steamship 'Pacific Cedar'" and carried thereby to ports of destination;

(4) That contemporaneous with the discharge of said cargo "the respondent Dimon Steamship Corporation and the respondent steamship "Pacific Cedar" *"DEMANDED,*

received and *COLLECTED*" from petitioner the freight at the tentative higher rate of $10.00;

(5) That the agreed applicable rate of freight was a lesser sum "instead of the $14,657.30 *demanded and collected by respondents*";

(6) That before commencement of suit, petitioner had "demanded from *respondents*" repayment of the difference between the sum actually paid and the sum rightly retainable; and that "*respondents* had wholly failed, refused and neglected to repay".

Petitioner submits that the admiralty practice requires only that the allegations of a libel for such a cause of action in rem show the actual facts, to wit, that the freight in excess of the amount earned and agreed was demanded and collected by the ship owner and not repaid by it, since, resulting from the contract and the loading of cargo thereunder, the breach of the contract is imputed to the ship as a matter of law. However, petitioner's libel not only alleged the actual facts, but it also alleged the legal facts.

Petitioner suggests that if the libel here fails to allege facts sufficient to constitute a maritime lien against the ship for return of freight money, all the decisions allowing and enforcing such a lien (heretofore cited by the briefs of petitioner in this cause) must be disapproved and overruled by this Court.

(7)

Lower Freight Rate of "Regular Intercoastal Carrier" Not Extraneous.

Brief of respondent on the merits of the question presented says the lower rate of the Luckenback Steamship Company "is unrelated to the performance of any obligation of carriage by the vessel" (p. 5). It is difficult to conclude that this notion is advanced seriously. A mere reading of the contract shows that respondent joined with peti-

tioner by means of the clause fixing the applicable rate and the amount of freight in an agreement which results in the impossibility of determining whether the contract has been performed or breached without resort to proof that there was a "lower rate to be applied" (R. 9). If the lower rate clause is extraneous in the contract here, petitioner echoes the language of the Court's opinion in *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267 (C. C. A. 5), when dealing with a charter party clause, identified as No. 7, requiring "sufficient cash for ship's disbursements at port of loading to be advanced the master by charterers or their agents, at current rate of exchange", etc.

Dispute arising as to the applicable rate of exchange, the Court said:

> "Such being the case, it may very well be that the libelant would have refused to charter the ship except upon the condition that the charterer would make and agree to observe stipulation 7 as expressed in the charter party. It is true that the mere fact of this agreement being embraced in the charter party would not, of itself, give it the character of a maritime contract; but its relations to the other stipulations of the charter party may be such (and we think appears to be such) as to connect it with the contract into which the parties were entering—a contract of undisputed maritime character—and in such a manner as to authorize the parties to apply to a court of admiralty to inquire into any alleged breaches of this stipulation 7. *Insurance Co. v. Dunham*, 11 Wall. 1-36; *Ben. Adm.*, Sec. 257-262, 287, and cases there cited."
>
> *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 271.

Freight being one of the three absolute essentials to every maritime affreightment (the very name is eloquent), petitioner submits the lower rate clause is not a mere "hangnail" to be trimmed off painlessly, but the heart essential to the life of the contract.

(8)

"Visible Occurrence" Present in this Case.

Respondent's brief has admitted that it can find no case asserting a maritime lien directly contra to petitioner's contentions. The brief says that "no decision of this Court or other courts has dealt with this precise question" (p. 5). It is true search in this litigation has not uncovered any decision involving similar facts where the lien has been denied; but petitioner's previous briefs make citation of and quotation from a number of well-considered opinions based on facts not distinguishable in principle where the lien has been upheld.

However, in distress for lack of other support, respondent resorts to the opinion of this Court in *O. S. K. vs. Pacific Export Lumber Co.*, 260 U. S. 490, 67 L. Ed. 364, and quotation therein from *The S. L. Watson*, 118 Fed. 945, to the effect that no lien arises "except in connection with some visible occurrence relating to the vessel or cargo".

As already observed, both these cases involved an assertion of a lien relative to cargo never loaded and for which the vessel had never been hypothecated. Hence the language of this Court's opinion must be read in the light of that fact.

As to the case of *O. S. K. v. Pacific Export Lumber Co., supra*, what "visible occurrence" was lacking? Merely the loading of the cargo left on the dock when the vessel sailed.

Possibly in tort cases the requirement of some "visible occurrence" results in the necessity of the damage being visible. Even in the field of tort, petitioner suggests the test may not be literally and strictly sound or reliable. Apply the test to this set of facts: A passenger aboard a vessel enters a compartment fumigated by invisible gas. The compartment should have been kept locked or should have been carefully aired. Inhaling the gas, the passenger's lungs, stomach or other vital organs are temporarily or permanently injured with no resulting symptoms of pain

except purely subjective. Could the maritime law of the land be construed to deprive the passenger of his lien against the ship merely because the damage was invisible?

Doubtless the maritime lien in the hypothetical case, the facts being proven, would be taken for granted as to the legal right without submission of doubt to any court. But if analysis of the illustrative case were made, the lien would probably be reconciled to the test of "visible occurrence" by reverting to the act of fumigation of the ship's compartment.

And this conclusion brings the discussion back to a consideration of maritime liens arising from breach of contract. What is the "occurrence" that must be "visible"? Petitioner submits that in affreightment cases the occurrence need not be the damage of which complaint is made, for considering cases supporting a lien for concealed damage to cargo, it is apparent that the antecedent loading of cargo resulting in mutual hypothecation of ship and cargo is the only requirement of this test.

Referring to both *O. S. K. v. Pacific Export Lumber Co., supra,* and *The S. L. Watson, supra* (in both of which the cargo was not loaded), it is said that the maritime lien is secret and must not be extended in principle beyond accepted limits, to the detriment of creditors and purchasers of the ship. Petitioner is relying upon long-adopted and long-established principles, but has experienced difficulty in this litigation merely from the novelty of the facts.

However, all maritime liens against vessels are secret in the sense that the law requires neither possession of the ship in the hands of the cargo owner nor recorded notice on file in any public office. And the lien asserted in this cause was never more deeply hidden and secreted from prospective creditors or purchasers of the ship than some other lien for concealed cargo damage, or for unjust port-of-call expenses, or for return of an excess sum paid for freight in calculating the rate of exchange, or for repay-

ment of a portion of freight returnable because of error in figuring port-of-loading advances made by the shipper. And all of the instances recited, together with many more of equal argumentative value, are history extracted from cases cited by petitioner's former briefs, and are not merely hypothetical, drawn from imagination.

In short, a lien asserted by petitioner is in no degree more secret or more hidden than the ordinary affreightment lien except where circumstances result in obvious damage to cargo. But of what actual practical benefit to prospective creditors or purchasers of the ship could the apparent quality of the cargo damage serve? Prospective creditors or purchasers can not rush from one port to another port tracing the derelictions of an ocean-going steamship by inspecting the docks and wharves for leaking oil drums or broken bath tubs. To criticize the maritime lien in this case as secret is to criticize all maritime liens. This quality of the maritime lien is doubtless a valid reason for limiting its extension in principle, but it is no just basis for refusal to apply the adopted and recognized principle to a contract novel only in its method of fixing the rate of freight.

(9)

Hypothecated Relationship Between Cargo and Ship Not Terminated Until Contract Fully Performed.

Respondent, in its brief and upon oral argument, has contended that the maritime lien asserted by petitioner was non-existent, because the same arose after completion of performance by the ship of its maritime obligations under the contract. This argument has successfully confused the District Court and the Appellate Court, but it should not mislead this Court. The contention is based solely upon a misunderstanding and misinterpretation as to the time when and how the lien claimed by petitioner arose.

In the first place, although the respondent ship did physi-

cally load, carry and discharge petitioner's cargo as contemplated by the affreightment contract, such physical service was not due performance of the ship's obligations under the contract, since the entire service was performed not in consideration of the agreed freight at the applicable rate, but was performed in consideration of an excessive freight, wrongfully demanded and wrongfully retained. In other words, it cannot justly be said that the respondent ship has made right delivery and has become entitled to exoneration from its pledge to the cargo resultant from loading under the affreightment contract.

And now discussion reaches the query as to the point of time when and as to the facts by which the maritime lien asserted by petitioner was born.

Examination of the authorities dealing with analogous liens in contract make it safe to declare that the lien did not arise only upon the actual demand and payment of excess unearned freight. In contemplation of law, the petitioner's right as cargo owner against the vessel arose upon the initiation of movement of similar cargo by a regular intercoastal carrier at a lower rate. The libel alleges that this movement occurred "in the month of January, 1930" (R. 6). It was in the same month that the libel alleges cargo was loaded by petitioner upon the respondent ship (R. 5).

The fallacy of respondent's argument in this connection has resulted from its failure to distinguish between the time when petitioner's damage as cargo owner was sustained and the time when its right to the maritime lien accrued. Once this distinction has been brought to light, authorities cited by respondent to this Court dealing with violations of affreightment contracts by a ship owner to the detriment of the cargo owner prior to the loading of cargo and prior to the mutual hypothecation of ship and cargo, become of no weight or consequence as an analogy in considering the present case for the purpose of determining whether a

maritime lien may wholly arise and develop into enforcibility after due performance and right delivery of cargo.

CONCLUSION.

In conclusion, petitioner invites the Court's attention to revert back to the opinion of *Dupont Etc. Co. v. Vance*, 60 U. S. 162, 168, 169, 15 L. Ed. 584, 586, where this Court said that "the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of the *obligations created by the contract of affreightment*, is a settled rule of our maritime law"; and also to consider this case in the light of the grant of maritime and admiralty jurisdiction by the several States to the United States and this Court, which grant must have been intended not to minimize but to preserve the maritime and admiralty jurisprudence of this country, of which the maritime lien is the special feature.

Respectfully submitted,

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EXPLANATORY NOTE.

Because of the brevity of time allowed by the Court's order for the preparation of this reply brief and collection of decisions dealing with the several points discussed, including liens based on concealed cargo damage, and because this brief has been prepared by petitioner's proctor under emergency circumstances, with the usual memoranda and facilities unavailable, it has been impossible to supplement citations previously made except by the few listed below, some of which have been received from the office of petitioner's proctor by telegram, the A. M. C. reports not being at hand.

Supplemental Citations.

Northern Pacific Railway Co. vs. American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 280;
The Artic Bird, 109 Fed. 167, 170;
The Eldorado, 1923 A. M. C. 430;
The North Cliffe, 1923 A. M. C. 933;
Mar Mediterraneo, 1924 A. M. C. 1067.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 734

KRAUSS BROS. LUMBER COMPANY, a corporation,

Petitioner,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the Steamship PACIFIC CEDAR, her engines, tackle, apparel, etc.,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 734

KRAUSS BROS. LUMBER COMPANY, a corporation,

Petitioner,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the Steamship PACIFIC CEDAR, her engines, tackle, apparel, etc.,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DECREE BELOW

In the lower court, respondent filed exceptions to petitioner's libel (R. 25, 26). These exceptions were sustained (R. 39) and a decree entered dismissing the libel on two grounds, to-wit: (1), that Admiralty has no jurisdiction and, (2), that no maritime lien exists (R. 41). The Circuit Court of Appeals for the Ninth Circuit affirmed the District Court in dismissing the libel in rem (R. 72, 73, 74), and reversed the District Court as to the libel in personam, holding that the action while not the basis of a maritime lien was cognizable in Admiralty in personam (R. 64-72). The Circuit Court

remanded the cause in personam to the District Court with directions to try the issues of fact on the answer filed by the ancillary receivers for respondent, Dimon Steamship Corporation (R. 85, 86). Petitioner now seeks to review the ruling entered on the in rem action before presenting the cause on its merits in the District Court on the libel in personam.

STATEMENT

Petitioner's statement of the "Question Presented" and "Summary of Facts," while substantially correct, includes conclusions of the petitioner as to the interpretation of the contract in question. There are also some deficiencies in emphasis of material facts.

The affreightment contract entered into between petitioner as shipper and respondent as carrier (R. 9) is one for the carriage of lumber at stipulated rate of $10.00 per M feet net measurement. Under the heading of "Remarks" in a separate part of the same contract the clause concerning a lower rate (commonly known as a "fall clause") is stated as follows:

> "In the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate is to be applied."

The cargo was carried as agreed and discharged "between the 1st and 20th days of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent, Dimon Steamship Corporation and respondent, Steamship PACIFIC CEDAR demanded, received and collected from libelant (petitioner) the sum of $14,657.30, the freight

on the aforementioned shipment at the rate of $10.00 per M feet" (R. 5, 6). It is alleged that during January, 1930, a regular intercoastal carrier moved similar cargo at a lower rate of $8.50 per M feet net measurement (R. 6). Petitioner then alleges that "later" it demanded payment to it by respondent of the difference between $10.00 per M feet and $8.50 per M feet, which demand was refused (R. 6). Libel in rem against the respondent Steamship PACIFIC CEDAR and in personam against Dimon Steamship Corporation, owner thereof, was filed May 18, 1931 (R. 2) fourteen months after the cargo was discharged and the freight had been paid.

QUESTION PRESENTED

Does a maritime lien exist against a vessel in favor of a shipper on the following facts: A cargo of lumber was loaded, carried and delivered at destination and accepted by consignees. Freight at the rate of $10.00 per M feet as provided in the contract was voluntarily paid by the shipper. The contract contained a contingency clause that if a regular intercoastal carrier moved a similar cargo at a lower rate such lower rate would be applied (R. 9). It is alleged that a regular intercoastal carrier did carry at a lower rate (R. 6). This fact was unknown to any of the parties at the time the freight was paid. The freight voluntarily paid by petitioner and received by respondent Dimon Steamship Corporation was more than should have been paid. Some time later, stated in the libel as "before the commencement of this proceeding" (R. 6) petitioner demanded payment of the difference between $10.00 per M feet and $8.50 per M

feet, which respondent refused to pay. Fourteen months after voluntary payment of the freight a libel in rem and in personam was filed (R. 2).

GROUNDS ASSERTED AS A BASIS FOR GRANTING THE WRIT NOT SUFFICIENT

I

There is No Conflict of Decisions Between Circuit Courts of Appeal

Petitioner cites but one case in support of this position, to-wit, *The Oregon, et al v. Pittsburgh & Lake Angeline Iron Company*, 75 Fed. 666, by the Circuit Court of Appeals for the Sixth Circuit. The case of the OREGON, supra is not a case in conflict with the one at bar. The question of Admiralty jurisdiction in rem was not raised by the parties or considered an issue by the court. One of the claims made by charterers was to recover from the owners certain profit wrongfully paid the owners by the Master of the ship. The case also involves other claims against the vessel. "Another averment was that the OREGON without the consent of the libelant took in tow a great many vessels on her trip to and from Marquette, thereby preventing her from making as many trips as possible and resulting in the loss of another trip" (page 668). The nature of the claim involved was different than in the present case. The money collected by the captain and paid by him to the owners rightfully belonged to the charterers (the libelant) and in no sense involved a contingency or voluntary payment on mutual mistake or ignorance of facts, nor does it appear from the reported

decision whether the action was solely in rem or both in rem and in personam. In any event the issue of in rem jurisdiction was not raised and it cannot be said therefore, even assuming the facts to be in point with the case at bar, that there is conflict in the decisions.

II

The Question Does Not Justify Settlement by This Court

Respondent does not feel required to answer the purely extra legal and academic statement of petitioner as to inconvenience which might result from the non-existence of a maritime lien on the facts of this case. The rights of shippers of cargo have been defined by numerous decisions of this Court. No uncertainty exists as to the nature, basis or application of the law of maritime liens on vessels. The application of such general principles to particular facts is not the function of this Court unless there is a conflict in existing decisions or ambiguity and confusion in the application of the law as established, to particular facts. It is true that no decision of this Court can be found wherein the well established law of maritime liens has been applied to the exact facts involved in the case at bar. The application made by the Circuit Court of Appeals in its decision is not in conflict with decisions of this Court but is based upon and follows the decisions of this Court.

Petitioner on page 9 of its Brief cites three cases as being applicable to the question presented here and contrary to the holding of the Circuit Court of Appeals in the case at bar.

B. L. Harriman v. Emerick, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

Allanwilde Transportation Corporation v. Vacuum Oil Company, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

International Paper Company v. Gracie D. Chambers, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

These cases are not based upon the same or similar facts as those in the case at bar but do announce the same rules of law which the Circuit Court of Appeals has applied to the particular facts in the present case. The question of the existence or non-existence of a maritime lien was not an issue before the court in those cases. Each case was decided upon its merits. No question of jurisdiction in rem could have been raised therein as each case involved an issue of an alleged unfulfilled obligation of the vessel itself.

In the Harriman case, supra, there was involved a charter of the vessel to deliver coal to the Spanish Navy at an unknown destination, one-half of the freight money to be paid upon loading and the balance to be paid on return of cancelled bills of lading showing delivery. The consignee could not be found and the vessel returned without delivery of the coal. Upon return, the vessel offered to deliver the coal to the shipper upon payment of the balance of the freight due, which was refused. The owner of the vessel sold the cargo under a claim of lien for freight and the shipper libeled for the return of the prepaid freight and value of the cargo sold. Recovery of freight paid and proceeds from the sale of the cargo was affirmed by this Court.

Concerning the issues presented, this Court said, at page 170:

> "In settling the rights of the parties the inquiries which demand our attention are: What was the contract between them? *Was it fulfilled by the ship;* and if not, was the non-fulfillment excused, by phone or waiver, on the part of the charterer or by other facts disclosed in the proofs so as to entitle the owner to all or any part of the freight money stipulated for in the charter party." (Italics ours).

The Court held that the ship had not fulfilled its contract. No question was raised as to jurisdiction in rem and the case cannot be cited as authority on this point. Also there was involved a failure of performance by the vessel itself in that it had not carried and delivered the cargo as agreed.

> "The existence of war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional, that the vessel should proceed to Valpariso. The presence or absence of the consignee was immaterial. If absent, it was the right and duty of the Master to place the cargo in store. The contract was not fulfilled; for this the shipper is in no wise responsible. Such are the relations of the parties."

In the Allanwilde and the International Paper Company cases supra, the situations were the same. Both actions were to recover prepaid freight by reason of the failure of the vessel to carry and deliver the cargo as agreed. The cargo had been loaded on board and the freight prepaid but clearance was refused by the government on all

vessels bound for the War Zone. This Court in both cases held for the respondent on construction of the bills of lading involved. *The basis of the claim was a failure of the vessel to perform its undertaking. No question of in rem jurisdiction was mentioned in either case.*

This Court had frequently held and it is elemental that a decision is not an authority upon a question not considered by the Court even though involved in a case decided.

Durousseau v. United States, 6 Cranch, 307;
United States v. More, 3 Cranch, 159;
United States v. Mitchell, 271 U. S. 9; 46 Sup. Ct. Rep. 418.

III

This Case Follows Applicable Decisions of This Court

What has already been said in Section 2 of this brief concerning the cases of *B. L. Harriman v. Emerick*, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870); *Allanwilde Transportation Corporation v. Vacuum Oil Company*, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919); *International Paper Company v. Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919), applies here. These decisions are not in conflict with the case at bar but follow the same general rules applied to different facts.

Petitioner attacks the Circuit Court of Appeals' decision for misapplication of the two cases of *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 92, 15 L. Ed. 554, 557 and *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 499, 67 L. Ed. 364, 367.

The decision of the Circuit Court of Appeals does not attempt in any manner to apply the particular facts of either case cited above to those of the present case. These cases are cited and followed as the general rule of this Court for establishing "the basis for a maritime lien upon a ship in cases involving a contract for affreightment" (R. 72). These cases, having established general rules of maritime law are authority for any case involving a maritime lien when used as a test and determination of the existence of a lien on any given set of facts.

To the general rules of law expressed by this Court the Circuit Court of Appeals applied the facts of the present case and concluded (R. 74):

> "To enforce a lien against a ship where neither the owner or master of the ship on the one hand or the owner of the cargo on the other, knew of the facts upon which the lien is predicated, until after the right delivery of the cargo and where no visible acts or occurrence would give notice of the lien to the public would press the doctrine of a maritime lien beyond reason and beyond authoritative decisions. We concur in the conclusion of the trial judge that under the circumstances of this case no maritime lien exists on the ship."

This conclusion is sound. On the authority of *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 92, the obligation between ship and cargo is "mutual and reciprocal."

> "But this duty of the vessel to the performance of which the law binds her by hypothecation is to deliver the cargo at the time and place stipulated in

the bill of lading or charter parties without injury or deterioration."

By analogy to the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Company* supra, where it is held:

"The contract of affreightment itself creates no lien and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the Master's custody." * * *

there can be no lien created for matters beyond a right delivery of cargo, at which time the vessel has performed its duty and mutual and reciprocal obligations have been terminated.

We are impressed by the result of reversing the facts and assuming that the clause contained in the contract provided for a higher rate on contingency. If the stated rate in the contract had been paid by the shipper on delivery under mutual mistake or ignorance of facts entitling the carrier to a higher rate, could the carrier impress a lien on the cargo for additional freight in the hands of consignees or the shipper after a right delivery. We think not.

The decisions of this Court are thoroughly in accord with the rule followed by the Circuit Court of Appeals on the in rem feature of this case to the effect that maritime liens being secret liens which may operate to the prejudice of general creditors and purchasers without notice are therefore *stricti juris* and cannot be extended by construction, analogy or inference. They are mutual and reciprocal.

IV

This Case Follows the Weight of Authority

In the case now before this Court, the libel does not allege that payment of freight was demanded and paid as a condition precedent to discharge and delivery of the cargo. It is not alleged that the happening of the contingency expressed in the contract was known to any of the parties at the time the stipulated freight of $10.00 per M feet was paid by petitioner. There are no allegations of any act or omission on the part of the vessel or that the vessel did not fully perform its obligations of safe carriage and proper delivery of cargo as agreed. The most that can be said from the allegations of the libel (R. 3, 4, 5, 6, 7, 8) which are taken as admitted for the purpose of considering exceptions to the libel is that there was a mutual mistake of fact at the time the freight was paid.

In addition to the general principles discussed in Section 3 of this brief supra, there is a further rule of law applicable to maritime liens which when applied to the facts in the case at bar distinguishes this case from those cited by petitioner as constituting the weight of authority. The rule is thus stated:

> *A maritime lien can be effected only by some visible contact with or occurrence relating to the service of the ship and must arise from an open, manifest, physical act or omission of maritime service.*
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 67 L. Ed. 364, 367;
>
> *The* S. L. WATSON, 118 Fed. 945 (C. C. A. 1st);

The KEOKUK, 9 Wall. 517; 519, L. Ed. 474, 475; *Israel v. Moore & MacCormack Company* (D. C.), 295, Fed. 919.

The inquiry here is as to what occurrences give rise to a maritime lien on a vessel. It has been frequently stated that it is not the policy of the maritime law to extend the doctrine of maritime liens to every matter relating to a vessel and its operation. These liens only arise when the vessel itself as distinguished from its owners commits some act or omission of duty imposed upon it. No lien exists before cargo is loaded or upon that which is loaded in respect to that which is not, as in the case of "dead freight." If, then, the vessel has made a proper and safe delivery of the cargo it has undertaken to carry, the imposition of a lien beyond the obligation of safe delivery when reciprocal rights have terminated would seem to violate the established rules of this Court as expressed in the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490. In that case this Court adopted the authority expressed in The S. L. WATSON, 118 Fed. 945, 952, as follows:

> "The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by

any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage*, 2 Curt. C. C. 421, Fed. Cas. No. 7,762; Parsons, Shipping & Admiralty, 1869, 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. C. C. 424, Fed. Cas. No. 7,762, that admiralty liens are stricti juris, and that they cannot be extended argumentatively, or by analogy or inference. He says: 'They must be given by the law itself, and the case must be found described in the law.' "

A further distinction exists in these cases which was not mentioned by the Circuit Court of Appeals in the present case. This distinction is the separable nature of the contract involved as expressed by the District Court in its opinion (R. 35):

" * * * every act having relation to maritime services was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive but rests upon the inquiry: May the claim for rebate on the alternate rate be separably enforced. *Compagnie Francaise v. Bonasse*, 19 Fed. 2nd, 777."

Keyser v. Blue Star Steamship Co., 91 Fed 267;

United Fruit Co. v. U. S. Shipping Board Merchant Fleet Corp., 42 Fed. 2nd, 222;

Pillsbury Flour Mills Co. v. Interlake Steamship Co., 40 Fed. 2nd, 439 (C. C. A. 2);

Taylor v. Weir, 110 Fed. 1005;

Brown v. West Hartlepool Steam Navigation Co., 112 Fed. 1018;

The claim for rebate, even though arising out of a contract of affreightment is separable and can be separably enforced. It (the claim) has no relation to any physical occurrence connected with the vessel or its undertaking to safely carry the cargo at a stipulated rate. It has no relation to any breach of duty by the vessel to deliver the cargo at the time and place stipulated for delivery. The claim is an independent and separable right, if any, arising on contingency created by a third party, to-wit, "other intercoastal carrier."

Israel v. Moore & MacCormack Co., 295 Fed. 919;

The Oceana, 148 Fed. 131.

In the Israel case supra, Judge Learned Hand had before him a claim for the recovery of freight voluntarily paid by the shipper by mistake. Part of the cargo, concerning which the freight sought to be recovered was paid, had been jettisoned unknown to the shipper. In holding that Admiralty had no jurisdiction and that the action was one in assumpsit, and in distinguishing that case from the Oceana supra, the Court said:

"* * * the right of recovery rested (in The OCEANA), rested upon the ship's unfilled promise."

Such was the understanding of the District Court in the present case (R. 38, 39): "In the case at bar, no action of the Master gave rise to the claim nor did the agreement between the owners of the ship and the owners of the cargo but the act of another."

The maritime lien has been extended in the relation between ship and cargo after loading as expressed in

Osaka Shosen Kaisha v. Pacific Export Lumber Co., to the performance of "right delivery" as expressed in the *Poznan* (D. C.) 276 Fed. 418:

> "In the *Poznan* (D. C.) 276 Fed. 418, decided by Judge Learned Hand who sat in *The Saturnus* case, the libels against the charterer and owner were in personam and in rem against the ship for pilferage and damage to cargo. He said that an action in rem could only be maintained for damage to the cargo resulting from the transportation such as improper stowage, breakage, pilfering or something of that nature but the decision was not limited to such damage, for in another part of the opinion it is stated that *there was a lien or privilege against the ship for 'right delivery,'* a term that in my opinion is not simply limited to safe and sound delivery but one that impliedly includes right delivery at a place designated by the shipper." (Italics ours).
>
> *The* G. A. TOMLINSON, 279 Fed. 786.

No case exists as authority for a lien for performance beyond right delivery, at which time reciprocal rights terminate. Petitioner has cited none.

In establishing the "weight of authority" petitioner has cited many cases involving liens for the recovery of freight. It is too clear for argument that a lien may exist for recovery of prepaid freight when the ship has committed a breach of its undertaking having to do with the loading, carriage and delivery of the cargo and this applies to breaches by the Master as well. The facts of those cases are widely different from the present case.

Those cases involve some "fault of the vessel or Master" (The *Keokuk*, 9 Wall. 517).

In *The Panama*, Fed. Cas. 10,703, the vessel failed to sail.

In *Church v. Shelton*, Fed. Cas. 2714, the Master made fraudulent representations.

In *The St. Joseph*, Fed. Cas. 3908, part of the cargo had been jettisoned.

In *The Hardy*, Fed. Cas. 6056, the Master failed to account for the purchase price of cargo and freight collected from consignees.

In *The A. M. Bliss*, Fed. Cas. 274, freight advanced to the vessel was not earned because the voyage contemplated by the charter was not prosecuted.

In *The Emma*, Fed. Cas. 18218, the Master collected money and failed to account for it. The Court in that case said:

> "The duties assumed are entirely those of a common carrier and a common carrier is as much liable for a failure to transport and deliver what is received by him for transportation as he is for failure to deliver any other character of freight."

In *The Henry W. Breyer*, 17 Fed. (2d) 423, the vessel failed to sail after the cargo was loaded.

The issue here is not whether the lien having once been created can be enforced or exist after the vessel and cargo are separated but is whether the matters alleged in the libel are of such a nature as to give rise to a lien in the first instance. The use of the words "right delivery" do not refer to a point of time but to a performance of undertaking, to the completion of which the vessel is hypothecated.

CONCLUSION

This case involves well established rules of maritime law concerning the existence of maritime liens. The Circuit Court of Appeals has applied these rules as established by this Court to the particular facts of this case and held that no maritime lien was created under those facts. There is no conflict in the law between different Circuit Courts of Appeal. The case cited by petitioner is clearly distinguishable on the facts involved and no question of in rem jurisdiction was raised or discussed by the Court.

There is no conflict between this case and any decision of this Court. The law as established by this Court in *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 90, 15 L. Ed. 554, 556, and *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 499, 67 L. Ed. 364, 367, is followed and applied to particular facts. The Circuit Court of Appeals does not attempt to apply the facts of those cases to the case at bar, but follows them on the law announced as determining the basis and character of a maritime lien.

The fact that this Court has never applied the established rules of law as announced by this Court to the particular facts involved in the case at bar is not sufficient ground for granting writ of certiorari.

The application of the law to the particular facts in the case at bar is not contrary to the weight of authority as contended by petitioner. Each case cited by petitioner wherein a maritime lien was allowed for the recovery of freight paid can be clearly distinguished from the case at bar on the particular facts involved. Each case involved

some failure in performance of the obligations on the part of the Master or vessel "to deliver the cargo at the time and place stipulated in the bill of lading or charter party without injury or deterioration." (*Vandewater v. Mills*, 60 U. S. 82, 90). No such failure of performance exists in the case at bar. The action is one to recover money from the respondent in the nature of excess freight paid by reason of a contingency for a lower rate unknown to the parties at the time payment at the stipulated rate was voluntarily made and received. The action has no reference to the performance of carriage and delivery of the cargo. There is alleged an independent claim made enforceable by the action of a third party, to-wit; another intercoastal carrier and has no relation to the vessel or the mutual and reciprocal obligations between ship and cargo. These had terminated by right delivery.

The only reported case involving similar facts which can be considered in point is the case of *Israel v. Moore & MacCormack* (D. C.), 295 Fed. 919, 920, where it was held that there was no jurisdiction in admiralty at all but only an action in assumpsit.

The law is well settled by this Court and not undetermined as claimed by petitioner. No reason has been cited why this Court should grant a writ of certiorari unless it be to make an application of established law to particular facts.

Respondent respectfully submits that the petition for writ of certiorari be denied.

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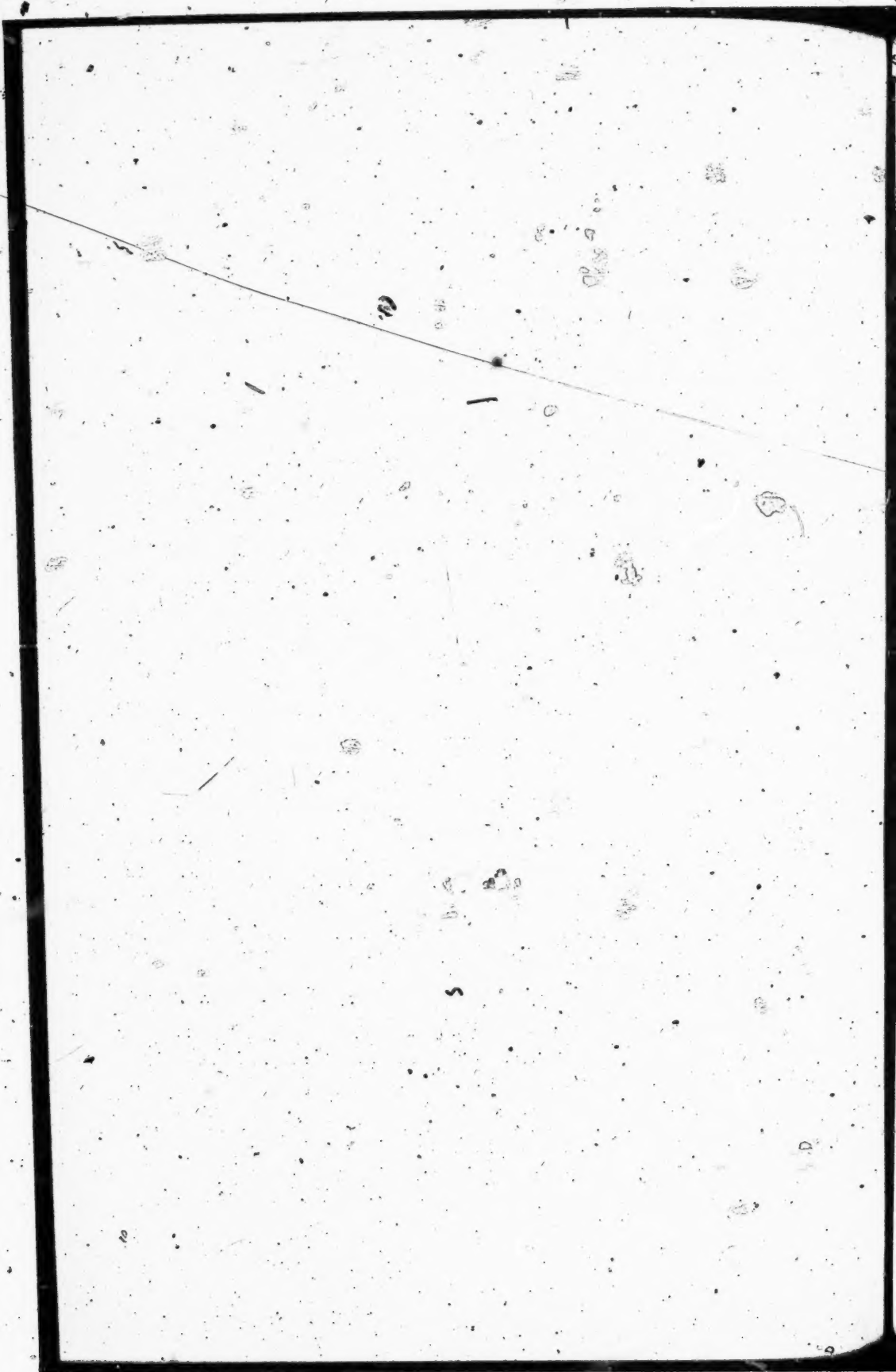

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 4

KRAUSS BROS. LUMBER COMPANY, a corporation,
Petitioner,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the Steamship PACIFIC CEDAR, her engines, tackle, apparel, etc.
Respondent.

BRIEF OF RESPONDENT

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT

This case involves a point of admiralty jurisdiction in rem raised upon exceptions to the libel sustained by the lower court (R. 25, 26). The facts therefore are all contained in the libel (R. 3) and Exhibit "A" attached thereto (R. 9). These facts are relatively simple. Taking the allegations of the libel as admitted for the purpose of considering exceptions thereto, the facts appear as follows:

On November 22, 1929, libelant, Krauss Bros. Lumber Company, a corporation, and respondent, Dimon Steamship Company, a corporation, entered into a contract of carriage for certain cargo of lumber from Puget Sound and Grays Harbor ports to Philadelphia and New York at the agreed rate of "$10.00 per M feet net measurement" (R. 9). The contract also provided: "8. Upon the cargo being loaded on the vessel, it shall be carried subject to the terms, exceptions and conditions of the carrier's regular bill of lading which shipper agrees to accept and be bound by" (R. 11).

The cargo was loaded on respondent's steamship PACIFIC CEDAR and carried to destination as required under the contract "at the ports of New York, Philadelphia and Baltimore between the 1st and 20th day of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent, Dimon Steamship Company, a corporation, and respondent Steamship PACIFIC CEDAR demanded, received and collected from libelant the sum of $14,657.30, the freight on the aforementioned shipment at the rate

of $10.00 per M feet" (R. 5, 6). It is then alleged that in the month of January, 1930, a regular inter-coastal carrier, the Luckenback Steamship Company, carried similar cargo from Seattle to Boston at the rate of $8.50 per M feet, and that by reason of a clause contain in the contract of carriage to the effect that if a regular inter-coastal carrier carried similar cargo at a lower rate, such lower rate would be applied (R. 9) there is now due and owing to libelant the difference between $10.00 per M feet paid and $8.50 per M feet charged by another regular inter-coastal carrier. It is further alleged that "before the commencement of this proceeding" libelant demanded the sum alleged to be due, which demand was then refused (R. 6).

The respondent in this action, in establishing its position herein, relies upon an interpretation of these facts in the following respects which are material to the decision:

1. The contract of carriage (Exhibit "A") is one between libelant and respondent, Dimon Steamship Corporation, executed several months prior to undertaking the carriage of cargo therein referred to. The contract specificially provides the cargo is to be carried when loaded on the vessel subject to the terms, exceptions and conditions of the carrier's bill of lading. (R. 11). This contract, therefore (Exhibit "A") is not the contract under which the respondent Steamship PACIFIC CEDAR actually carried the cargo.

2. The contract (Exhibit "A") expressly provides for freight at the rate of $10.00 per M feet net measurement. The clause providing for a lesser rate on contingency is

an independent undertaking. It is contained under the heading of "remarks" (R. 9) along with other independent clauses in the contract. In this respect it is in the nature of a rebate; calling for a fixed rate of freight with a right to rebate on a named contingency. While it is not alleged by the libel, we must assume that the rate of freight provided in the bill of lading was a fixed sum, probably $10.00 per M feet.

3. The libel does not allege that the freight of $10.00 per M feet was wrongfully or unlawfully exacted, or that it was paid under protest or as a condition precedent to delivery. We must, therefore, contend that the facts show a voluntary payment by libelant according to the contract rate.

4. The libel does not allege that either party knew of the alleged fact that another regular carrier had carried similar cargo at a lower rate at the time freight was paid at destination, at $10.00 per M feet. It necessarily follows that the deduction most favorable to the libelant from this allegation is that the freight was voluntarily paid by mutual mistake of facts, or that libelant having knowledge of the happening of the contingency made a voluntary payment intending to secure a rebate from respondent Dimon Steamship Corporation.

5. The libel does not allege any fault or breach by the respondent steamship PACIFIC CEDAR in its performance of the Act of Transportation, having to do with the loading, carriage and delivery of cargo or otherwise. The only manner in which the respondent vessel is connected with the libel is the allegation that the owner and the vessel collected the freight at destination at the rate of

$10.00 per M feet. In this respect there is no allegation as to the vessel's undertaking, or that the vessel was in default in any respect.

6. The proof necessary to sustain the libel necessarily must be that the Luckenback Steamship Company carried similar cargo at the rate of $8.50 per M feet. This fact is the very basis of libelant's right of recovery. It is unrelated to the performance of any obligation of carriage by the vessel.

7. The libel contains no allegation as to when the libelant discovered the fact of carriage by Luckenback Steamship Company at a lower rate. It is not alleged that the respondent, Dimon Steamship Corporation or the respondent Steamship PACIFIC CEDAR had any knowledge of this fact at any time. The allegation is merely that "prior to the commencement" of the action, demand was made. The action was started more than fourteen months after payment of the freight.

ARGUMENT

No decision of this court or other courts has dealt with this precise question. Petitioner has cited none, and we are unable to cite definite precedent on the question presented on the particular facts involved. Respondent's position is, however, strongly supported by analogy and reasoning of existing decisions. The very nature of a maritime lien and the development of precedent denies the right of lien in this case.

I

A Breach or Violation of a Contract of Affreightment Does Not Always Give Rise to a Maritime Lien

A. *This court has frequently held that a breach of a contract of affreightment which is wholly executory does not give rise to a maritime lien.*

The Keokuk, 9 Wall. 517; 19 L. Ed. 744 (1870);

The Freeman v. Buckingham, 18 How. 182, 59 U. S. 182 (1855);

The Lady Franklin, 8 Wall. 325, 75 U. S. 325 (1868).

In the *Keokuk*, 9 Wall. 517, the court said:

> "It is a principal of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain *by the fault of the vessel or the master*, but the law creates no lien on a vessel as security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made and the cargo to which it relates has been delivered to the custody of the master or someone authorized to receive it.
>
> * * *
>
> "* * * and if it be the corporation is somewhat to blame for this, the steamer has not on that account committed any fault for which she is chargeable in admiralty, as no one in her behalf contracted with the libelant to transport the barge. * * * And he did nothing to transfer its possession to the steamer. The libel cannot be sustained."

B. *That the contract is partially executed gives no right of lien for failure to fully execute the contract.*

O. S. K. v. Pacific Export Lumber Co., 260 U. S. 490; 67 L. Ed. 364 (1923);

S. L. Watson, 118 Fed. 945 (C. C. A. 2), (1902).

In the case of *O. S. K. v. Pacific Export Lumber Company*, supra, the ship had undertaken to load and had loaded part of the cargo covered by the affreightment contract, but refused to load all of the cargo. Libelant claimed part performance of the contract gave rise to the right of a maritime lien for breach of the contract. The court said:

> "The theory that partial acceptance of designated cargo under a contract of affreightment creates a privilege or lien on the ship for damages resulting from a failure to take all, is inconsistent with the opinions of this court and we think without support of adequate authority." (Citing the *S. L. Watson*, 118 Fed. 945, 952).

C. *A breach of contract of affreightment gives no right of lien where the breach occurs with respect to matters done or omitted prior to the loading of cargo, even though the contract thereafter becomes fully executed by loading, carriage and delivery of all of the cargo.*

The Saturnus, 250 Fed. 407 (C. C. A. 2);
The Ask, 196 Fed. 165 (D. C.);
The General Sheridan, Fed. Cas. No. 5319 (D. C. N. Y.).

In *The Saturnus*, supra, the court considered this question: "Is a maritime lien upon hull or cargo, as the case may be, the normal and lawful result of every legal claim for damage due to any violation of the terms, express or implied, of a contract of carriage under which a carriage is ever actually begun?"

The facts of the case were that the shipper had incurred extra expense for moving his cargo from one berth to another made necessary by the refusal of the

shipowner to load at the designated berth. The cargo was thereafter loaded, carried and discharged at destination. A libel in rem was filed to recover the expenses incurred by the shipper by reason of the breach of contract to load at the berth designated therein. The court held no lien existed as the breach occurred before reciprocal rights between ship and cargo came into existence and the later existence of the relation did not by loading and carriage give right to a maritime lien.

> "To make lien depend on its relation to a point of time, i. e., the date of delivery to ship is perhaps fictional or mechanical rather than thoughtful, yet for lack of a better line of demarcation has long been well known in matters of statutory liens of mechanics and others.
>
> "In *The Ask* (D. C.), 196 Fed. 165, ship's alleged wrongful delay caused waiting cargo to spoil and after lading a lien was asserted for antecedent damages. The delay was adjudged excusable, but McPherson, J. pointed out that any lien came into existence 'at the time the injury was done.' The necessary inference being that as nothing was laden at date of injury, there was nothing to which the lien could then attach, and there certainly cannot be a lien in Nubibus waiting to descend."

II

The Maritime Lien or Privilege is a Matter of Strict Right, a Jus in Re Accompanying the Property into the Hands of Bona Fide Purchasers and Operating to the Prejudice of General Creditors, and is Therefore Stricti Juris and Not to be Extended Argumentatively or by Analogy or Inference

The Lady Franklin, 8 Wall. 325, 75 U. S. 325 (1868);

The Maggie Hammond, 9 Wall. 435, 76 U. S. 435 (1869);

The Keokuk, 9 Wall. 517, 19 L. Ed. 744 (1870);

The Freeman v. Buckingham, 18 How. 182, 59 U. S. 182 (1855);

Vandewater v. Mills, 19 How. 82, 15 L. Ed. 554 (1857);

O. S. K. v. Pacific Export Lumber Company, 260 U. S. 490, 67 L. Ed. 364 (1923);

The S. L. Watson, 118 Fed. 945 (C. C. A. 2) (1902);

The Saturnus, 250 Fed. 407 (C. C. A. 2) (1918);

The G. A. Tomlinson, 279 Fed. 786 (D. C. N. Y. 1922).

The following language of this court in *Vandewater v. Mills* (The Yankee Blade), 19 How. 82, by Mr. Justice Grier, is all inclusive of the rule and was quoted by this court in the case of *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490:

> " 'The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and devested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore 'stricti juris,' and cannot be extended by construction, analogy, or inference. 'Analogy' says Pardessus (Droit Civ. vol. 3, 597), 'cannot afford a decisive argument, because privileges are of *strict right*. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.'
>
> * * *

" 'Now, *it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance.* This lien or privilege is founded on the rule of maritime law as stated by Cleirac (597): 'Le batel est obligee a la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter party) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter party, its convenants will define the duties imposed on the ship. Hence it is said (1 Valin, Ordon, de Mar. b. 3, title 1, art. 11) that 'the ship, with her tackle the freight, and the cargo, are respectively bound (affectee) by the covenants of the charter party.' *But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter party, without injury or deterioration.* If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the nondelivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

* * *

" 'And this court has decided, in the case of *The Freeman v. Buckingham*, 18 How. 188, 15 L. Ed. 343, 'that the law creates no lien on a vessel as a security for the performance of a contract to trans-

port cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.'"

III

The Facts of the Present Case, When Tested by the Law Applicable to Maritime Liens, Do Not Give Rise to a Lien on the Respondent Vessel in Favor of the Libelant

The maritime lien does not arise from a mere breach of contract of affreightment, but must arise out of the Act of Transportation. The lien is reciprocal and mutual in that the ship is bound to the cargo and the cargo to the ship. And no lien may arise under a contract of affreightment until the cargo is loaded or in the possession of the master or the vessel, at which time the mutual obligations arise. These obligations are that of the ship to safely carry and deliver and the obligation of the cargo for the payment of freight. In this respect the vessel is personified in the law and the breach must be one done or omitted by the vessel as such in its relation to the cargo. A fault or breach having no relation to the act of transportation by the vessel, such as one committed by the owner, gives no right against the vessel. This lien being a jus in re adheres to the property into the hands of bona fide purchasers without notice; it is a secret lien and a matter of strict right. The lien must be given by the law itself and cannot be extended argumentatively by analogy or inference. It is stricti juris and if not well defined in the law should not be allowed.

The application of these principles to the facts of the case now before the court presents a problem requiring careful analysis. Many cases exist which inferentially

substantiate the lien in this case. These, when carefully analyzed, are clearly distinguishable. We attempt, in the remaining part of this brief, to analyze these decisions on the basis of the general principles heretofore set forth.

A. *No fault of the respondent vessel in relation to performance of the Act of Transport or at all, is involved, and no lien exists.*

The briefs heretofore filed in this case tend somewhat to confusion because of the lack of a precise statement of contention. The many cases cited by petitioner are of little value to the court except when analyzed, to illustrate the distinction. None of them are in point on the facts and all can be distinguished upon one ground or another. There is some loose language in some of the decisions and in others the point of jurisdiction was not raised.

(*1*) ***Respondents position is this:***

There is in this case no allegation in the libel, or a reasonable inference therefrom, of any fault, act, breach, omission or occurrence of any nature done or omitted by the respondent vessel PACIFIC CEDAR which could possibly be the basis of a maritime lien upon the vessel. After a cargo is loaded and reciprocal rights between the ship and cargo exist, the obligation of the ship is for proper stowage, care and handling of the cargo and delivery of the same at the time and place designated in the contract of affreightment or bill of lading. The obligation of the cargo is to pay freight. All of this was fully accomplished in this case. It has been said that the obligation to which the ship is hypothecated extends to a "right delivery of cargo." The use of the word "obliga-

tion" does not refer to a point of time, but to the fulfillment of those things which the ship is obliged to do. This is referred to in some decisions as the "Act of Transportation," and when, as in this case, the act of transportation is fulfilled as to all obligations coming thereunder, no lien exists against the vessel on account of matters occurring outside the scope of such undertaking.

A test to be applied in each case is the nature of the proof necessary to sustain the libel. If the proof be that the ship or its master failed in some obligation to the cargo in respect to the act of transportation, then a lien exists for such breach. If, on the other hand, the proof be that the owner failed in some respects or as in the case now before the court that a third party did an act which gives rise to the claim, no lien exists. In the present case the proof at the time of trial would necessarily be that another intercoastal carrier carried similar cargo at $8.50 per M feet. This is the very basis of libelant's cause of action. It has no relation to the respondent Steamship PACIFIC CEDAR or any undertaking to which the vessel was hypothecated. The fact that the agreement for a rebate is contained in a contract of affreightment is immaterial as a lien is not necessarily the normal result of all breaches of such contract.

(2) *The following cases, many of which are relied upon by petitioner, when analyzed are found to be in thorough accord with the law as contended for by respondent.*

The G. A. Tomlinson, 279 Fed. 786 (D. C., W. D. N. Y.):

This case was a libel in rem by a shipper to recover freight. The facts were that the ship undertook in a bill of lading to deliver the cargo at a designated place. The ship did not unload at the place named, but at another and different place, where freight was demanded by the ship as a condition precedent to delivery of the cargo. The freight was paid under protest by the shipper. The lien was upheld by the court upon exceptions to the libel.

The court said that:

> "* * * the lien must arise from the 'Act of Transportation' such as improper stowage, breakage, pilfering, or something of that nature, but such lien also extends to right delivery. * * * A term that in my opinion is not limited to safe and sound delivery but one that impliedly includes right delivery at the place designated by the shipper."

In this decision the idea of the necessity of the personified ship committing or failing in some act or obligation is forcefully discussed and considered. The idea of a wrongful act by the ship as such in the nature of a tort, although it may also be breach of contract, is the distinction respondent is now contending for. The court said:

> "If I am right in holding the relations were creative of a maritime lien it may be that the freight paid is recoverable on the theory that it was *wrongfully exacted.*" (Italics ours).

The Keokuk, 9 Wall. 517:

While this case is most frequently cited as authority for the proposition that no lien exists for breach of an executory contract of affreightment, the language of the court lends further support to our contention.

The facts were that libelant had unknown to the shipowner loaded one of the latter's barges with a cargo of grain. When the "Keokuk" arrived in port at midnight, and during a storm, libelant handed papers which were later found to be bills of lading, to an officer of the boat then busily engaged in checking cargo. It was not made clear to him what the papers were and the "Keokuk" left port without the barge. The barge remained unattended during the night and sank.

> "It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain *by the fault of the vessel or the master.* * * * The steamer has not on that account committed any fault for which she is chargeable in admiralty." (Italics ours).

The idea of the necessity of a fault on the part of the ship is here expressed by this court. If a fault or omission in some respects be necessary on the part of the ship to create a maritime lien, and therefore no lien can exist where the vessel has not taken possession of the cargo, then certainly the same faults or omissions are necessary after it has taken possession of the cargo in order to create a lien upon the vessel.

The Freeman v. Buckingham, 18 How. 182:

The master of the ship was appointed by the charterer (owner pro hac vice). He issued bills of lading for flour never received on board the vessel. The bills of lading were fraudulent. Libelants were consignees named in the bills of lading who did not receive the flour.

This court held that there was no maritime lien on the vessel, aside from the ground of no cargo having been loaded, on the further ground that the fraudulent acts of

the master were not attributable to the owner as he, the master, was agent of the special owner.

> "There can be no implication that the general owner consented that false pretenses of contracts having the semblance of bills of lading should be created as instruments of fraud or that if so created they should in any manner affect him or his property. They do not grow out of any employment of the vessel and there is as little privity or connection between him or his vessel and such simulated bills of lading as there would be between him and any other fraud or forgery which the master or special owner might commit."

While more remote, the same idea of fault or wrong by the vessel or its master necessary for a maritime lien to exist is here expressed.

It is well to note at this point that a distinction must be made between cases where the maritime lien is denied by reason of failure of the relation of ship and cargo and those where the cargo is loaded and carried and the ship commits some breach.

In the former case it is held that no lien exists even though the ship or master commits a breach. In the latter instance no case has ever been decided where a lien was allowed without a fault of the ship or master in respect to the obligations which are a part of the Act of Transportation.

It was so stated in *The Saturnus*, 250 F. 407, 411:

> "There can, we think, be no doubt that never was a privilege properly awarded for an expense put on a shipper and not caused by physical damage to goods actually carried *and by the act of transport.*"

In *O. S. K. v. Pacific Export Lumber Co.*, 260 U. S. 490, the decision states:

> "Having taken on a full underdeck cargo and 241,559 feet upon the deck, the captain refused to accept more."

This was a wrongful act of the master in respect to the obligation of the vessel and yet this court, holding to the strict application of maritime liens, held that no lien existed for this plain breach. The reason for denying a lien in the *O. S. K. v. Pacific Export Lumber Co.* case, supra, following the language of the *S. L. Watson*, 118 F. 945, 952, is much less forceful than in the case now before the court. In our present case no wrongful act or breach of the Act of Transportation existed. There was no "visible occurrence relating to the vessel or the cargo" to give rise to any lien.

The Muskegon, 10 Fed. (2) 817 (D. C. S. D. N. Y.):

Here the libel was to recover duplicate freight on prepaid cargo demanded by the master as a condition precedent to delivery. In order to obtain delivery of the cargo freight was therefore paid under protest. In refusing to deliver the cargo the ship was liable for failure to make a right delivery.

> "It is for the failure and refusal of the steamship *Muskegon* to deliver the cargo in accordance with the bills of lading to the consignee that libelant brings suit."

The lien was allowed in this case, but here again the court adheres to the idea of the necessity of a fault of the ship in respect to the Act of Transportation. This case is cited by petitioner as authority for its position. It is clearly distinguishable and well illustrates the distinction existing in the cases.

The General Sheridan, Fed. Case No. 5319 (D. C. S. D. N. Y.):

"Any duty that may be violated by the owner or master before the cargo is put on board is not a duty of the vessel or one for the breach of which a lien on the vessel is created or can be enforced. So, too, under the covenant if the cargo is not laden on board it is not bound to the vessel and therefore the vessel cannot be in default though the master or owner may be for the nondelivery of the cargo."

The S. L. Watson, 118 Fed. 945 (C. C. A. 2);

The Thomas P. Sheldon, 113 Fed. 779 (D. C. R. I.):

These two cases are the same; one being in the district court and the other the Circuit Court of Appeals for the 2nd Circuit. Both cases are of value in connection with the present case, first, because this court expressly approved the *S. L. Watson* in *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490, and second, because the language used by the courts in the decisions lends definite support to respondent's position here.

The facts of these cases are not in point. The question was whether a charterer had a maritime lien on various barges for failure of the owner to make more than one voyage when the undertaking was that both barges would complete five voyages. One barge completed one voyage, but no further performance was had. On these facts the court held that there was no maritime lien, even though one barge had undertaken and entered upon the performance of the contract of affreightment by making one voyage. In arriving at this conclusion, and in stating the reasons why no maritime lien existed, the court expressed and followed general propositions of admiralty law which apply to support respondent's position here.

"The charter or affreightment contract itself creates no lien. The lien arises only when cargo has been loaded on board and it makes no difference that part of the contract has been executed. Courts have held that where the contract remains wholly executory, that no lien is created by its breach, or until some cargo is loaded and reciprocal rights exist. (*The Freeman v. Buckingham*, 18 How. 182; *The Keokuk*, 9 Wall. 517).

"The vessels * * * so far as voyages not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implications, but they well and truly performed such voyages as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners."

Does this not suggest the theory that the contract of affreightment between shipper and shipowner is to some extent at least independent and separate from the obligation of the vessel to perform the act of transportation after a cargo is loaded. In the cases cited here the contract made specific reference to both the *S. L. Watson* and the *Thomas P. Sheldon* as being obligated to carry the cargo, and yet the court says that "*the vessels never entered into any contract either expressly or by implication.*" The obligation of the vessel arises only upon the loading of cargo, or upon undertaking the act of transportation, but this undertaking may be varied, depending upon each case. As in the case of the *Oceano*, 148 Fed. 131, relied upon so strongly by petitioner, the master receipted for the advances on the bills of lading, and therefore undertook as a part of the very act of transportation to deduct these advances from the freight collected at destination. This he failed to do. Therefore

it was a breach of the undertaking of the vessel itself. The obligation was made a part of the act of transportation by endorsement of the master on the bill of lading and his undertaking to deduct the advances.

The frequently stated doctrine that the ship is bound to the cargo, and the cargo to the ship, and that a maritime lien must be mutual and reciprocal, is a mere formula for arriving at the result in each case. It illustrates the fact that the undertaking of the ship to perform the act of transportation is a separate obligation. This undertaking is usually set forth in a bill of lading which defines the respective obligations of the parties. These obligations as set forth then become the act of transportation to the performance of which the vessel is hypotheticated.

In *The Thomas P. Sheldon*, supra, the court aptly said:

> "It seems very clear from these authorities that the contract itself creates no lien and that the lien which is created by the law is mutual and reciprocal. The parties to this contract undoubtedly had mutual and reciprocal rights of lien during the carriage of the first cargo, *but the lien of the ship on the cargo was discharged by the payment of freight and by delivery to the consignee.* The contention that the lien in rem now exists cannot be based upon the principle that the ship is pledged to the cargo and the cargo to the ship, and if there is a lien it is unalateral and not mutual and reciprocal. * * * The lien of the cargo owner upon the ship must therefore be limited by the corresponding and reciprocal rights of the shipowner upon the cargo." (Italics ours).

Even though the contract between the parties was not completed and called for additional voyages, the court said that the lien was "discharged by the payment of

freight and by delivery to the consignee." This is because the vessel had completed its undertaking.

This is because the vessel has completed its undertaking, not under the contract, but the act of transportation to the performance of which the vessel is hypothecated.

Considering next the language of the circuit court in the *S. L. Watson*, 118 Fed. 945 (C. C. A. 2), which was quoted and approved by this court in *O. S. K. v. Pacific Export Lumber Company*, 260 U. S. 490, where the court said:

> "The rule of admiralty as always stated is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise, disregard the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for but not actually put aboard. *The Kiersage*, 2 Curt. 421, Fed. Case. No. 7762; *Pars. Ship. & Adm.* (1869) 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. 424, Fed. Case No. 7762, that admiralty liens are stricti juris and that they cannot be extended argumentatively or by analogy or inference. He says: 'they must be given by the law itself and the case must be found described in the law.' "

The court also said:

> "As to the latter proposition we may well add

> that while so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessel being inanimate could not by the very nature of things enter into a strictly executory contract. *Each of them could be subjected to such duties only as might arise by implication of law from the circumstances of a voyage or other concrete act on which it had in fact entered and* therefore as to them each of the several voyages was logically independent and single." (Italics ours).

These statements of the court are clear that the right of lien being a privilege and secret must be connected with some visible occurrence related to the ship or cargo or must be connected with the obligation of the ship itself in respect to the act of transportation which arises by implication of law and is not necessarily extended to all obligations of the contract of affreightment. These liens are of strict right and are not to be extended to situations not well defined in the law. The conclusion therefore is patent that the mere fact that the provision for a rebate on contingency in the present case is contained in the contract does not give rise to a maritime lien to recover the rebate when it is not alleged that the ship wrongfully exacted the higher rate, or that the allowance of the rebate was related to the Act of Transportation. No facts appear from which it can be inferred that the agreement for an allowance of rebate was part of the act of transportation. If the lien is not to be extended because it is secret and operates to the prejudice of innocent parties dealing with the vessel, there is here a case where not even the owner at the time of receiving payment is alleged to have knowledge of the facts upon

which the petitioner now claims recovery; nor was there a visible occurrence relating to the ship and cargo. All parties considered the transportation performed and terminated by payment and delivery. As in *Israel v. Moore & McCormick*, 295 Fed. 919, it cannot now be said that discovery of a mistake in making overpayment can be asserted by maritime lien. The action is for money had and received. The respondent has received money to which it is alleged it is not now entitled. And why? Because another intercoastal carrier carried at a lower rate, not because the vessel failed in any respect in its obligation to the cargo. The case seems clear.

The Saturnus, 250 Fed. 407 (C. C. A. 2):

In this case the court expresses the same thought we are attempting to convey herein when it was said at page 414 of the decision:

> "In respect of carriage of goods in particular, every public benefit has for centuries been deemed obtained when goods were liable for freight and the ship for safe and sound delivery of goods the mutuality of relations thus growing out of the act of transport, not the making of a contract for transportation. Anything more than this multiplies secret liens and hampers instead of advances ease and freedom of commerce."

B. *The relevant consideration to determine whether a breach of the Act of Transport is involved is the facts upon which petitioners claim is based. (What is the proof necessary to sustain the action?)*

Home Ins. Co. v. Merchants Transportation Co., 16 Fed. (2) 372 (C. C. A. 9):

While the action in this case was one in admiralty in

personam and admiralty jurisdiction was denied altogether, the case lends support to the case at hand.

The suit was one to recover back from the respondent certain insurance money paid by libelant to respondent on a policy of marine insurance. The claim was that payment was made in reliance on misrepresentation and fraud of the assured. The claim to admiralty jurisdiction was based upon the fact that the action involved a policy of marine insurance and the construction of the same. In denying admiralty jurisdiction, the court said:

> "Here the action is not merely an action on a maritime contract or tort nor a suit to enforce liability under the covenants of policies of marine insurance. It is an action growing out of certain alleged inequitable acts of the appellee and primarily its purpose is to recover money obtained by means of fraud and false representations. In such a case in an action for damages as for tort, it is sufficient to entitle the plaintiff to recover if he has so far relied upon the false representations of the insured that but for such representations the payment would not have been made. *Hartford Ins. Co. v. Matthews*, 102 Mass. 221. Money so paid may also be recovered in an action as for money had and received."

This language can be transposed to fit the present case. The action here is not one upon a contract of affreightment or tort, but is a suit arising by reason of the act of a third party and to recover money paid by mistake of facts. The money so paid could be recovered in an action as for money had and received.

The further language of the court is material to the present question:

> "In either form of action the first question for determination is whether or not the appellee im-

posed upon the appellant by false proof of loss and the appellant, in ignorance of the fraud, paid the money upon the policy."

Applying this statement to the case at bar, it would read: (Quotes are ours).

> "The first question for determination is whether or not the Luckenback Steamship Company carried similar cargo, as alleged, at the rate of $8.50 per M feet, and that the libelant in ignorance of this fact paid freight at the rate of $10.00 per M feet.",

United Transportation & Lighterage Co. v. N. Y. & Baltimore Transportation Line, 185 F. 386 (C. C. A. 2): This was a cross libel to recover excessive charges for lighterage services rendered under a written contract. The contention was one Groves, who made the contract, was at the same time an officer and director of both companies, and that the contract was fraudulent. The libel was in personam.

The court held that the action was not within admiralty jurisdiction:

> "The admiralty grants relief legal in its nature when and only when the subject matter of the suit is maritime. Admiralty has jurisdiction over maritime contracts but it has none over contracts leading up to the execution of maritime contracts, and upon similar principles it can have no jurisdiction over nonmaritime transactions following the execution of maritime contracts.
>
> * * *
>
> "The maritime contract was the one which respondent says was fraudulent. It does not seek to enforce but to avoid that. It cannot, however, have such contract set aside without invoking the equitable relief which a court of admiralty cannot grant. Moreover, even from this point of view the matter

is not maritime. *The fundamental question is whether the general manager of respondent, induced by his interest in libelant corporation, betrayed his trust, but this question is not maritime in its nature.*"

There are two important points in this decision applicable to the present case. There the overpayment was alleged to be due to fraud. In our present case the overpayment was due to mistake. In both cases payment was in connection with a maritime service. Also, in the cited case the fundamental question was whether Groves, induced by his interest in the corporation, betrayed his trust. This had nothing to do with the act of transportation and obligation of the vessel engaged therein. In our present case the fundamental question is whether the Luckenback Steamship Company carried similar cargo at a lower rate. This question also has no relation to the act of transportation or the obligation of the respondent steamship PACIFIC CEDAR in performing its undertaking.

Following the case of *United Transportation & Lighterage Co. v. N. Y. & Baltimore Transportation Line*, supra, is the case of *Israel v. Moore & McCormick*, 295 F. 919 (D. C. N. Y.):

In this case libelant shipped coffee from Rio to New York. En route part of the coffee was jettisoned and upon arrival libelant, in ignorance of the fact that part had been jettisoned, paid the full amount of freight. The libel was for recovery of freight paid upon the cargo jettisoned. The court held that the action was not cognizable in admiralty but was an action for money had and received:

"Therefore when a question arises of the jurisdiction of the admiralty over such an obligation the

relevant consideration should be those facts from which the law raises the obligation, not the mere form of the remedy or the fictitious promise.

" * * *

"In the case at bar the reason why the respondent ought not to keep the money is that he has not performed the contract of affreightment. He has been paid for something which he did not do. * * *. The question of the maritime nature of the obligation depends upon whether it makes a difference that it was a maritime service which he failed to perform."

Illustration of the fact that the court had in mind the distinction contended for in the case at bar, whether this case was rightly decided or not, is found in the language of the court distinguishing the case of *The Oceano*, 148 F. 131 (D. C. S. D. N. Y.):

In *The Oceano:*

" * * * the ship had agreed to deduct from the freight all disbursements paid by the charterer who mistakenly overpaid here. *The right of recovery rested upon the ship's unfilled promise.*" (*Israel v. Moore & McCormick*, 295 F. 919). (Italic ours).

The Oceano, 148 F. 131 (D. C. S. D. N. Y.):

In reviewing petitioner's brief filed herein, it appears that great emphasis is placed on the *The Oceano* as authority for the existence of a maritime lien in the present case. Respondent is willing to take issue with petitioner upon *The Oceano* and now answers petitioner's brief, pages 24, 25, 26 and 27, as a further illustration of the distinction in the cases cited by petitioner.

These facts, in *The Oceano*, supra, are material to the distinction: (1) the amount of the advances was endorsed upon the bills of lading by the master; (2) by some

unexplained error the master upon arrival deducted £300 less than he should have deducted from the freight; (3) "this erroneous settlement was reduced to writing and signed by the same master who had receipted for the actual advance"; (4) the agreement to repay the the charterer the full amount of the advances was in this case a part of the act of transportation; (5) the master of the vessel did a wrongful act in failing to deduct all of the advances, which was known to him, he having signed the original bills of lading and receipted for the advances.

The court places this decision on the basis of a deliberate refusal of the master "to pay an advance of freight." To this extent the vessel breached an obligation undertaken and part of the act of transportation. The obligation was to safely carry the cargo to destination and to repay the advance of freight. On this theory the case is correctly decided and distinguishable from the case at bar.

While distinguishable on the facts, it is to be noted that the language of the court is too broad and not a correct statement of the law. We refer to the following quotation:

> "As soon as the performance of a charter party is commenced a lien exists on the vessel in favor of the shipper or charter and a suit in rem may be maintained for any liability of the master or owner arising therefrom."

Insofar as the liability of the owner is concerned this statement is error. The lien arises only from some breach of the ship or its master in connection with the act of transportation. To illustrate, suppose a contract of affreightment under which a cargo was carried and delivered provided that upon the shipper paying the

freight therein upon delivery at destination the owner would build a house for the shipper. The owner received the freight and thereafter refused to build the house. Could it be said that an action for damages for failure to build the house (or perform any other acts) would support a claim of maritime lien on the vessel merely because there was a breach of the contract of affreightment. Or suppose the undertaking of the owner under the affreightment contract was to carry a return cargo for the same shipper free of charge, and the owner refuse to allow the cargo to be loaded and carried on the return voyage. This breach of the contract would certainly give no lien upon the vessel.

We reiterate that the basis of the action must be a fault or breach chargeable to the ship or its master in relation to the act of transportation concerning which the reciprocal rights exist in order for a lien to attach.

The reason why admiralty had no jurisdiction in *Israel v. Moore & McCormick*, supra, also supports the reason why no maritime lien exists in the present case. The illustration is one of the nature of the action and whether it involved the obligation of the vessel in respect to the act of transportation.

C. *A maritime contract may contain separable non-maritime elements not enforceable in admiralty, and not part of the Act of Transport.*

In respondent's brief in opposition to the petition for a writ of certiorari in this case, cases are cited (page 13) to support respondent's further contention that the claim for a rebate on alternate rate as stated in the contract is an independent clause and may be separably enforced.

While this position was originally urged on the point that admiralty had no jurisdiction at all, which position was sustained by the District Court and reversed by the Circuit Court of Appeals, it nevertheless has a direct bearing upon the question of in rem jurisdiction.

If the claim for rebate in this case is separable and can be separably enforced, such fact lends further support to respondent's contention that petitioner's present claim is not one arising out of the act of transport by the respondent vessel PACIFIC CEDAR. The law being settled that no lien arises in respect to any claim whether arising under a contract of affreightment or not unless it also arises out of the act of transport, the question of whether this claim asserted by petitioner arises out of the act of transport becomes material. It does not so arise if it is separable and can be separably enforced independent of the act of transport.

The libel in this case does not allege that at the time freight was paid by petitioner upon delivery that any other rate than $10.00 per M feet was known by the parties or ascertainable by them. Therefore, the clause (R. 9) providing for a lower rate on contingency could only be effective as a rebate clause entitling petitioner to recover back part of the freight paid, which at the time paid was intended and supposed by both parties to be the rate applicable to the shipment. It would be an impossible construction to hold that the rate applicable to the shipment was never fixed and remained in suspense depending upon what third parties might do whether known or not. That this intention and construction is the one placed upon the entire transaction by the libelant

is borne out by the fact that libelant does not allege in the libel that the freight was unlawfully or wrongfully collected or that libelant was compelled under protest to pay freight in excess of the contract rate. The libel is clear in alleging that the libelant is entitled to recover back part of the freight paid because of the happening of a contingency the existence of which was unknown to both parties at the time of payment. This, then, is a claim for rebate and is entirely separable and not a part of nor arising out of the act of transport to the performance of which the vessel is hypotheticated.

Taylor v. Weir, 110 Fed. 1005 (D. C. Ore.): In this case the charter party which was executed contained an agreement for the payment of commissions. The commissions were not paid and libel in personam was brought. In holding that admiralty had no jurisdiction, the court said:

> "The fact that the agreement for commissions constitutes a clause in the charter party does not make it a maritime contract. The question of jurisdiction does not depend upon the form of the contract but the substance of the undertaking."

This case was later affirmed by Circuit Court of Appeals for the Fifth Circuit in the case of *Brown v. West Hartlepool Steam Navigation Co.*, 112 Fed. 1018, involving also a commission agreement contained in a charter party. In holding that admiralty had no jurisdiction, the court said:

> "The District Court held that this stipulation is not a maritime obligation or contract enforceable in admiralty and we concur. See *Taylor v. Weir* (D. C. Ore.), 110 Fed. 1005, and cases there cited."

Pillsbury Flour Mills Co. v. Interlake Steamship Co, 40 Fed. 2nd, 439 (C. C. A. 2):

This case, by the Circuit Court of Appeals for the Second Circuit, involves a cargo of grain shipped from Milwaukee to Buffalo. The bills of lading provided for carriage and for winter storage. The vessel arrived in Buffalo and anchored "there to store her cargo of wheat for the winter months." There was no report of damage to cargo upon arrival. The following spring the cargo was discharged in a damaged condition. The court held:

> "These bills of lading embody a dual contract; one for transportation and the other for storage, and a breach of that contractual obligation which is non-maritime may not be the subject of a suit in admiralty." See also *The Richard Winslow*, 71 Fed. 426; *The Pulaski*, 33 Fed. 383; *Keyser v. Blue Star Steamship Co.*, 91 Fed. 267.

Compagnie Francaise de Navigation a Vapeur v. Bonnasse, 19 Fed. 2nd, 777 (C. C. A. 2):

In this case the owner, after damage to the vessel constituting a general average loss, procured a general average bond in favor of the charterer. Another bank thereafter took over the assets of the bank issuing the bond and assumed payment of all its banking liabilities. The suit was against the second bank upon the general average bond. The court held that the action could be maintained in admiralty even though the contract was both maritime and non-maritime. This was so because the maritime obligations of the contract could be separately adjudicated. The court said:

> "The mere fact that the contract covers a subject matter of both kinds is not, therefore, decisive. That would make the mere form control. The sub-

stantial question is whether the maritime obligation can be separately enforced without prejudice to the rest."

D. *Petitioners Authorities.*

Further discussion of authorities will be only cumulative; however, respondent wishes to point out the distinction existing in several cases cited and relied upon by petitioner.

In *The Emelia S. DePerez*, 22 Fed. 2d. 585 (D. C. Md.), the action was one by a shipper to recover the vessel's portion of general average contribution. A libel in rem was sustained. This decision, however, was based upon the distinct theory that the libelant was suing the ship for its contribution in general average. The court said:

> "So if any one or more cargo owners liens when asserted against the vessel for the latter's share completely exhaust such share, the vessel cannot be further libeled."

In *Tatsumma K. K. K. v. Robert Dollar Company*, 31 Fed. 2nd 401 (C. C. A. 9), additional freight was demanded by the vessel as a condition precedent to delivery and was paid under protest. The freight had been prepaid. The right of respondent to retain the additional freight rested upon an interpretation of the bill of lading. Nothing was said by the court in this case concerning the question of in rem jurisdiction.

In *The Captain Faure*, 10 Fed. 2d 950 (C. C. A. 2), the libel was in rem for damages for failure of the vessel to sail after the cargo had been loaded aboard and bills of lading signed by the master. This was an especially plain breach of the act of transportation in failing to carry the cargo at all.

In *The Ada*, 233 Fed. 325 (D. C. Md.), the libel was to recover additional freight demanded on arrival as a condition precedent to delivery. The additional freight was paid under protest. The libel in rem was sustained. Here, too, was a wrongful act of the vessel occurring during the transportation. It is also significant that no question of in rem jurisdiction was raised in this case.

In *The Fredensbro*, 18 Fed. 2d 983 (D. C. Pa.), the libel in rem was to recover freight paid. After loading cargo the ship was in collision with another vessel and sank. The failure to carry the cargo was a fault which gave rise to the right of maritime lien.

The *Henry W. Breyer*, 17 Fed. 2d 423 (D. C. Md.). Here various shippers loaded cargo and prepaid the freight. The vessel did not sail because of financial difficulty and cargo was later reloaded on another vessel and carried to destination. The court also had before it the question of foreclosure of a preferred mortgage and whether the liens of the shippers were prior to the right of the preferred mortgagee. This depended upon whether the shipper's liens constituted tort claims. The court finds that the shipper's liens were tort claims in that the vessel failed to carry the cargo as agreed after having loading the same and issued bills of lading therefor. While this was breach of contract, it was also a claim in tort and allowed as such.

The *John Francis*, 184 Fed. 746 (D. C. Ala.). This case quite adequately illustrates the distinction existing in the cases. The action by proceeding in rem was to recover charges made against the cargo for demurrage. These charges were paid under protest. The court said:

"I find that the payments made and complained of were made under protest. Moreover they were exacted by the master as a condition on which he would deliver the cargo."

The three cases cited by petitioner in its brief on petition for certiorari, decided by this court, are not in any respect in point. Reference is made to the following:

Allanwilde Transportation Co. v. Vacuum Oil Co., 248 U. S. 337; 63 L. Ed. 312 (1919).

International Paper Company v. Gracie D. Chambers, 248 U. S. 387; 63 L. Ed. 318 (1919).

B. L. Harriman v. Emerick, 76 U. S. 161, 19 L. Ed. 629 (1870).

In the first two cases no question of in rem jurisdiction was raised, nor could have been as the actions were based upon an alleged cause for the recovery of freight paid, the vessels having loaded cargo and having failed to deliver the same at destination. There was a distinct failure on the part of the ship in the act of transportation in both cases. In the *Harriman* case no question of in rem jurisdiction was raised, but the facts showed a distinct breach and fault on the part of the vessel in failing to deliver cargo as undertaken. The ship did not perform the act of transportation. None of these cases are inconsistent with, but rather support the contention of respondent in this present case.

In *The Oregon*, 55 Fed. 666 (C. C. A. 6 (1893), most strongly relied upon by petitioner, the question of in rem jurisdiction was not raised. It is true that the court held the libelant's right to recovery as to the $104 collected by the master of the *Palms* was incidental to the

maritime contract and therefore fully within the admiralty jurisdiction.

This case can be distinguished on the ground that the master of the *Palms* collected $104 more from a consignee of the libelant than the agreed freight set forth in the charter under which the cargo was carried. In this respect the action of the master was wrongful. Had the point been raised in *The Oregon*, it is doubtful whether Justice Taft would have reached the conclusion that a maritime lien existed in favor of the libelant for recovery of the item of $104. This feature of the case was very incidental to the main question at issue and was undoubtedly overlooked. We cannot feel that the case is correctly decided on this point. It may be that the facts are not fully set forth in the opinion and that the master in fact had knowledge of and was bound by the charter in the collection of freight and undertook to collect the $104 for the charterer and to pay the same to the charterer. If such were the facts his failure in this respect would constitute a fault or breach occurring in respect to the act of transportation.

That petitioner entirely misunderstands respondent's position is evidenced by its supplemental brief. No contention is made by respondent that a maritime lien does not exist for freight, the inquiry being, however, upon what facts does the claim for freight, or return of freight, rest. What is the basis of the claim. If it be that the vessel committed fault in respect to the act of transportation, a lien will lie; if it be that the owner or ship failed in some respect not connected with the act of transport, there is no foundation for a lien. Again, peti-

tioner seeks to narrow respondent's position to that of a claim that the lien is limited to the physical obligations of the vessel. Respondent's position is not so narrow. A breach of any obligation undertaken by the vessel gives rise to the lien. In this respect many obligations may be contained in a contract of affreightment for the performance of which the vessel is not hypothecated.

The Saturnus, 250 Fed. 407, 409 (C. C. A. 2):

> "Is a maritime lien upon hull or cargo as the case may be the normal and lawful result of every claim of damage due to any violation of the terms, express or implied, of a contract for carriage under which a carriage is ever actually begun. The inquiry must go this far, because no reason can be given for upholding the presently asserted lien that will not also support a multitude of other demands quite as close to the act of transport as is the one at bar, and all of them breaches of the maritime contract of affreightment."

The inquiry here is the same. Assuming libelant's claim to be a valid claim for damages due to a violation of the express terms of the contract of carriage, still the inquiry must be does the claim arise out of the act of transportation to the performance of which the vessel is hypothecated. The decisions having announced that the act of transportation begins when the cargo is loaded, requires proper care and handling and delivery at destination and as said in the *G. A. Tomlinson*, 279 Fed. 786, the place designated in the bill of lading. The question now, therefore, is whether the claim of libelant can be said to arise out of the act of transport. Had not the Luckenback Steamship Company carried cargo at a lower rate, there would be no claim and *a fortiorari*, the act of the

Luckenback Steamship Company is the factor giving life and right to a claim, without which no claim would exist. Therefore, under no theory can it be said that the claim here arises out of the act of transportation undertaken by the respondent steamship PACIFIC CEDAR. Payment of freight was made and received voluntarily and at the rate specified. The most that can be said for libelant's position is that payment was voluntarily made by mistake of fact. In no sense was a fault committed in respect to these matters by the vessel and no lien exists by reason thereof.

CONCLUSION

No maritime lien exists upon a vessel for breach of any contract of carriage unless it arises out of the act of transport to the performance of which the vessel is hypothecated. This is so because maritime liens are mutual and reciprocal and arise only in connection with some visible occurrence relating to the ship or cargo. Such liens are stricti juris and cannot be extended argumentatively. The act of transport extends only to a right delivery of cargo by the vessel and the payment of freight by the shipper or consignee, upon the fulfillment of which reciprocal rights terminate.

In this case all matters having relation to the act of transport were performed by the vessel. Freight was paid according to the rate stated in the contract. The parties had no knowledge of any facts which would alter the stated rate of $10.00 per M feet. The payment was voluntary. The happening of a contingency that another intercoastal carrier carried for $8.50 per M feet gave life

to the right for a rebate. No act of the vessel or its owner was involved. The right to rebate of part of the freight is separable and can be separably enforced. The right to rebate being separable and no part of the act of transport, is not an obligation of the vessel in its relation to the cargo. No lien exists for the enforcement of the rebate now claimed by petitioner. Petitioner's action is one in the nature of "for money had and received."

Respondent requests that the decree of the Circuit Court of Appeals for the Ninth Circuit be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1933.

Krauss Bros. Lumber Company, Petitioner, *vs.* Dimon Steamship Corporation, Claimant of the Steamship "Pacific Cedar," Her Engines, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 13, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

This suit in admiralty was brought by petitioner in the District Court for Western Washington against respondent, the steamship "Pacific Cedar", and its owner, the respondent Dimon Steamship Corporation, to recover an alleged overpayment of freight and to establish a lien on the vessel for the amount of the overpayment. The libel alleges a contract by petitioner with the owner, by which the latter agreed to receive for loading on the "Pacific Cedar", on or about January 18, 1930, at named Pacific Coast ports, a quantity of lumber, and to transport it to Philadelphia and New York at the rate of $10.00 per thousand feet, but with a provision that in the event "a regular intercoastal carrier moves similar cargo at a lower rate", such lower rate should be applied. The libel makes no reference to any bill of lading but sets up that the lumber was shipped and transported, and between March 1st and 20th was delivered, all under the provisions of the contract, and that at the conclusion of the voyage and while the vessel was discharging her cargo, respondents, at destination, demanded and received payment of freight at the $10.00 rate, although in January, 1930, a regular intercoastal carrier had carried a similar cargo from Seattle to Baltimore at $8.50 per thousand feet.

The lien asserted is for the difference between the freight paid and the freight earned at the agreed lower rate. Upon exceptions the District Court dismissed the libel for want of admiralty jurisdiction. 53 F. (2d) 492. The Court of Appeals for the Ninth

Circuit reversed the decree dismissing the libel *in personam*, but affirmed so much of it as dismissed the libel *in rem*. 61 F. (2d) 187. This Court granted certiorari on petition of the libellant alone, 289 U. S. 716, to resolve an alleged conflict between the decision below and that of the Court of Appeals for the Sixth Circuit in *The Oregon*, 55 Fed. 666, 676. The only question presented here is whether the petitioner is entitled to a lien on the vessel for the overpaid freight.

While there has been a lack of unanimity in the decisions as to the precise limits of the lien in favor of the cargo, see *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U. S. 490, the cases are agreed that the right to the lien has its source in the contract of affreightment and that the lien itself is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance. See *The Schooner Freeman*, 18 How. 182, 188; *Vandewater* v. *Mills*, 19 How. 82, 90; *Osaka Shosen Kaisha* v. *Pacific Expor Lumber Co.*, *supra*; *The Flash*, 1 Abb. Adm. 67; *The Rebecca*, 1 Ware 188; *Scott* v. *The Ira Chaffee*, 2 Fed. 401. This engagement of the vessel, or its hypothecation, as distinguished from the personal obligation of the owner, does not ensue upon the mere execution of the contract for transportation. Only upon the lading of the vessel or at least when she is ready to receive the cargo—when there is "union of ship and cargo"—does the contract become the contract of the vessel and the right to the lien attach. No lien for breach of the contract to carry results from failure of the vessel to receive and load the cargo or a part of it. See *The Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, *supra*, [redacted].

It is not questioned here that the union of ship and cargo, once established, gives rise to the right of the vessel to a lien on the cargo for the freight money and of the cargo on the vessel for failure to carry safely and deliver rightly. The breach now alleged is only that the freight demanded on discharge of the cargo was in excess of that stipulated by the contract, and respondent insists that the liens in favor of cargo growing out of the contract of affreightment are restricted to those claims founded on breach of the obligation to carry and deliver. But the undertaking to charge the agreed freight and no more is an inseparable incident

to every contract of affreightment, as essential to it and as properly a subject of admiralty jurisdiction as is the obligation of the cargo to pay freight when earned, or of the vessel to carry safely. See *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358. It is unlike an agreement to pay a commission to the broker procuring the charter party, *Brown* v. *West Hartlepool Steam Navigation Co,* 112 Fed. 1018, or a provision for storing cargo in the vessel at the end of the voyage, *Pillsbury Flour Mills Co.* v. *Interlake Steamship Co.,* 40 F. (2d) 439, which, though embodied in the contract of carriage for hire, are no necessary part of it.

It is not denied and the cases hold that there is a lien for excessive freight knowingly exacted as a condition of delivery of the cargo, *The John Francis,* 184 Fed. 746; *The Ada,* 233 Fed. 325; *The Muskegon,* 10 F. (2d) 817; *Tatsuuma Kisen Kabushiki Kaisa* v. *Robert Dollar Co.,* 31 F. (2d) 401; cf. *The Oregon,* 55 Fed. 666, 677, but it is argued that in that case the generating source of the right is the failure to perform the transportation contract by refusal to deliver the cargo. The fact that the breach of one term of the contract, the agreement to charge only the stipulated freight, coincides with the breach of another to make delivery, does not obscure the fact that both terms are broken and that the substance of the right to recover is for the freight collected in excess of that agreed upon, not damages for failure to make delivery. Nor does the fact that there is breach of both afford any basis for saying that the breach of either term alone could not give rise to the lien. This becomes more apparent upon examination of the numerous cases in which a lien has been imposed for some breach of the freight term.[1]

[1]Lien for freight paid in advance but not earned under the terms of the contract of affreightment: The Harriman, 9 Wall. 161; The Panama, 18 Fed. Cas. 10,703; cf. The A. M. Bliss, 1 Fed. Cas. 274; Church *v.* Shelton, 5 Fed. Cas. 2714. (See also Allanwilde Transportation Corp. *v.* Vacuum Oil Co., 248 U. S. 377, and International Paper Co. *v.* The Schooner Gracie D. Chambers, 248 U. S. 387, where the lien was denied because the freight was held to have been earned.) Lien for charges or purchase price of the cargo, collected by the master from the consignee for account of the shipper as provided in the contract of affreightment: The Hardy, 11 Fed. Cas. 6056; The St. Joseph, 21 Fed. Cas. 12230; Zollinger *v.* The Emma, 30 Fed. Cas. 18218; cf. The New Hampshire, 21 Fed. 925; Krohn *v.* The Julia, 37 Fed. 369. Lien in favor of the charterer for freight earned in violation of the charter party by the ship manned and officered by the owner; The Port Adelaide, 59 Fed. 174.

In *The Oregon, supra,* the time charterer sold the tonnage of the vessel for a single voyage at a rate in advance of that stipulated in the charter party. Her captain collected the freight at the agreed higher rate and retained it. The Court of Appeals for the Sixth Circuit, Judge Taft writing the opinion, sustained the jurisdiction *in rem* to recover the excess on the ground that its collection was incidental to the execution of the maritime contract, and to be treated as an overpayment of freight. This conclusion is obviously inconsistent with the view that the affreightment lien in favor of the cargo is dependent on the failure of the vessel to carry and deliver. The right to a lien for the mistaken overpayment of freight was involved in *The Oceano,* 148 Fed. 131, where the charterer advanced charter freight to provide a fund for the vessel's disbursements, under stipulation that the advance should be deducted from the freight earned under the charter party. Upon settlement at the port of destination the libellant's agent, by mistake, deducted less than the advances made. The court, Judge Hough writing the opinion, held, treating the settlement as an overpayment of the charter freight, that the cause was one of affreightment and that a lien attached to the vessel for the amount of the overpayment.

It was argued to us, as it has been in other cases, that as the payment for excess freight was made under mistake the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty. The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud or duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded.[2] Admiralty is not concerned with the form of the action, but with its substance. Even under the common law form of action for money had and received there could be no recovery without proof of the breach of the contract involved in demanding the payment,

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Lien for freight overpaid, as dead freight, for shortage of cargo wrongfully exacted by threat of attachment of the cargo actually shipped and delivered according to the contract: The Lake Eckhart, 31 F. (2d) 804. Lien for salvage, payment of which by the cargo was fraudulently procured by the master, who had wilfully stranded the vessel: Church *v.* Shelton, *supra.* Lien for the excess of a deposit by the cargo owner in a general average fund, the right of recovery being founded on the master's duty, and hence the ship's, to make the general average adjustment: The Emilia S. de Perez, 22 F. (2d) 585.

[2]See note 1, *supra.*

and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize. See *The Oceano, supra,* 132; but cf. *Israel* v. *Moore & McCormack,* 295 Fed. 919.

It seems equally obvious that lack of knowledge by the parties at the time of the payment that the freight demanded was excessive should have no bearing on the existence of the lien. There is no hint in the books that the security given by way of lien for the performance of the contract of affreightment depends upon such knowledge. The liability of the vessel for damage to cargo affords a not infrequent example of a lien which may attach, although at the time of unloading cargo there was no knowledge of the particular events which effected the breach. See *Rich* v. *Lambert,* 12 How. 347.

We see no distinction, either in principle or with respect to the practical operation or convenience of maritime commerce, between the lien asserted here for overpayment of freight by mistake and those for overpayments similarly made but induced by other means. Here, as there, the overpayment, made as the cargo was unloaded, occurred while the union of ship and cargo continued, and the liability asserted was determined by events contemporaneous with that union. The circumstances which called the lien into being do not differ in point of notoriety from those giving rise to other affreightment liens upon the vessel. While it is true that the maritime lien is secret, hence is *stricti juris* and not to be extended by implication, this does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles, merely because the circumstances which call for its recognition are unusual or infrequent.

The suggestion made on the argument that the lien asserted here, after the cargo is discharged, is affected by application of the often stated rule that the liens on ship and cargo are mutual and reciprocal, is without basis. It is only the obligations of ship and cargo under the contract of affreightment which are to be characterized as mutual and reciprocal, not the liens which result from the breach of those obligations. The one lien may come into existence without the other and the lien on the ship in favor of cargo, not being possessory, see *Dupont de Nemours & Co.* v. *Vance,* 19 How.

162; *Tatsuuma Kisen Kabushiki Kaisa* v. *Robert Dollar Co., supra,* may survive the lien of ship on cargo which is terminated by unconditional delivery.[3] *4885 Bags of Linseed,* 1 Black. 108.

We note, but do not discuss the objection that the libel may be taken to allege only a voluntary overpayment of the freight without mistake. We think it may be construed to mean that the payment was made without knowledge at the time that a lower rate controlled. The court below took that to be its meaning. Certiorari was granted to review the question decided below and not the sufficiency of the pleadings to raise it.

Reversed.

Mr. Justice McREYNOLDS, Mr. Justice SUTHERLAND, Mr. Justice BUTLER and Mr. Justice ROBERTS are of opinion that the challenged judgment should be affirmed.

Secret liens are not favored, they should not be extended by construction, analogy or inference, or to circumstances where there is ground for serious doubt. *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.,* 260 U. S. 490.

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[3]The statement that liens of affreightment on ship and cargo are mutual and reciprocal is based on the frequently quoted phrase of Cleirac (597): "Le batel est obligé à la marchandise et la marchandise au batel". Judge Hough indicated in The Saturnus, 250 Fed. 407, 412, that Cleirac's "clever phrase" referred to the mutual obligations flowing from the union of the personified ship and personified cargo.

It has often been pointed out that the lien on cargo is not strictly a privilege (see Pothier, Maritime Contract, Translation by Caleb Cushing, Boston, 1821, 94-50; Hennebicq, Principes de droit Maritime, Brussels, 1904, 316) as is the lien on the ship, but is more like the possessory lien of the land carrier and, like it, does not survive the unconditional delivery of the cargo. See Cutler *v.* Rae, 7 How. 729; 4885 Bags of Linseed, 1 Black. 108, 113; The Bird of Paradise, 5 Wall. 545; The Eddy, 5 Wall. 481, 494, and the full discussion in Wellman *v.* Morse, 76 Fed. 573.